TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 70.

LOUIS B. ADAMS AND WATSON N. SHILLING, APPELLANTS,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, ADMINISTRATOR OF EDWARD A. REED, DECEASED, AND MILLIE G. REED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 9, 1895.

(16,057.)

310
15
1550
31

(16,057.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 70.

LOUIS B. ADAMS AND WATSON N. SHILLING, APPELLANTS,

vs.

HIRAM H. HENDERSON, GEORGE H. BURGITT, ADMINISTRATOR OF EDWARD A. REED, DECEASED, AND MILLIE G. REED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Amended complaint	1	1
Answer to amended complaint	14	8
Stipulation as to answer to cross-complaint	27	16
Report of special master and referee	28	17
Finding of facts	29	17
Conclusions of law	41	25
Judgment and decree	43	26
Stipulation as to cross-complaint, &c	45	27
Statement on motion for new trial and appeal	46	28
Documentary evidence offered	47	29
Testimony of James N. Kimball	50	31
L. B. Adams	52	32
H. H. Henderson	55	34
K. S. Boreman	60	38
Stipulation as to evidence	65	41
Specification of particulars in which the evidence is insufficient to sustain the findings and decision of the court and of the master	68	42

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 17, 1897.

	Original.	Print.
Specification of particulars in which the conclusions of law and decision of the court and master are against the law	68	43
Specification of errors of law occurring at the trial and excepted to by plaintiffs	69	43
Notice of statement	70	44
Master's certificate to statement	71	44
Agreement as to statement	71	44
Notice of appeal	72	45
Order overruling motion for new trial	73	45
Agreement as to transcript on appeal	73	45
Hearing and submission	75	46
Decree	76	46
Allowance of appeal	76	46
Opinion	77	47
Citation and service	95	57
Assignment of errors	96	58
Bond	100	60
Clerk's certificate	101	61

1 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED, MILLIE G. REED, His Wife; Hiram H. Henderson, and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants. } Amended Complaint.

Come now the plaintiffs above named and by leave of court first had and obtained make and file this their amended complaint in the above-entitled action, and for a first cause of action allege—

That heretofore, to wit, on the 27th day of *of* March, 1890, the plaintiffs were the owners, in possession, and entitled to the possession of the following-described real estate, situate, lying, and being in Weber county, Utah Territory, to wit: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section.

That on said day the plaintiffs sold said real estate to the defendants Edward A. Reed and Hiram H. Henderson at and for
2 the price and sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars, and on said day said plaintiffs and their wives executed and delivered to said defendants, Edward A. Reed and Hiram H. Henderson, a warranty deed in the words and figures following:

Warranty Deed.

Louis B. Adams, Louisa M. Adams, his wife, and Watson N. Shilling and Angie Shilling, his wife, grantors, of Ogden City, Weber county, Utah Territory, hereby convey and warrant to Edward A. Reed and Hiram S. Henderson, grantees, of Ogden City, Weber county, Utah Territory, for the sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory:

An undivided two-thirds ($\frac{2}{3}$) of the east half ($\frac{1}{2}$) of section nine (9), township six (6) north of range two (2) west of the Salt Lake meridian.

Also an undivided two-thirds ($\frac{2}{3}$) of the south half of the southwest quarter of said section, and also an undivided two-thirds ($\frac{2}{3}$) of the northeast quarter of the southwest quarter of said section.

Witness the hands of the said grantors this twenty-seventh (27) day of March, A. D. 1890.

LOUIS B. ADAMS.
WATSON N. SHILLING.
ANGIE SHILLING.
LOUISA M. ADAMS.

Signed in the presence of—
FRED A. VOIGHT.

Which deed was duly witnessed, acknowledged, and certified, so as to entitle it to be recorded, and the same was on said 27th day of March, 1890, duly recorded in the office of the county recorder of Weber county, Utah Territory, in Book 5 of Deeds, at page 511.

3 That by said deed the plaintiffs intended to convey to said defendants, Edward A. Reed and Hiram H. Henderson, the real estate hereinbefore described, but by the mistake of the person who prepared the deed the said property was mistakenly described as being in township six (6) instead of township five (5) north of range two west of the Salt Lake meridian.

That the defendants Edward A. Reed and Hiram H. Henderson, immediately upon the execution and delivery of the deed hereinbefore set out, took possession of the real estate hereinbefore described and ever since have remained in possession thereof.

That the plaintiffs, so soon as they discovered the mistake in said deed hereinbefore set out, in the description of the property intended to be granted thereby, to wit, on the 27th day of September, 1891, made a certain other deed, executed by themselves and their wives, in the word- and figures following:

Quitclaim Deed.

Louis B. Adams and Louisa M. Adams, his wife; Watson N. Shilling and Angie Shilling, his wife, grantors, of Ogden City, Weber county, Utah Territory, hereby convey and quitclaim unto Edward A. Reed and Hiram H. Henderson, grantees, of Ogden City, Weber county, Utah Territory, for the sum of seventy-three hundred thirty-three and $\frac{34}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section.

4 Said grantors hereby covenant and agree to and with the said grantees that the said property was on the 27th day of March, A. D. 1890, free of all incumbrances of whatsoever description, and that said grantors were then seized in fee-simple of said property; and they further covenant and agree to and with the said

grantees that they have not since the said day encumbered or transferred the title of said property to any person whomsoever.

This deed is made to correct a certain deed made by said grantors to said grantees on the 27th day of March, 1890, in which deed the description of said property read "township six" instead of "township five," when it was the intention of all the parties to said deed that it should read township five instead of township six.

Witness the hands of said grantors this 29th day of September, 1891.

LOUIS B. ADAMS.
W. N. SHILLING.
ANGIE SHILLING.
LOUISA M. ADAMS.

Witness:
J. N. KIMBALL.

Which deed was duly witnessed, acknowledged, and certified, so as to entitle it to be recorded, and on said day the plaintiffs tendered said deed and the sum of $1.50, the recorder's fee for recording the same, to said defendants, Edward A. Reed and Hiram H. Henderson, and which deed the plaintiffs bring into court for said defendants.

That said last deed was made for the purpose and with the intent to correct the mistake in the description in the first deed herein set out.

That at the time of the execution of said first deed herein set out it was the intention of the plaintiffs and of the defendants Edward A. Reed and Hiram H. Henderson that the said deed should convey the property hereinbefore first described and in the second deed herein set out and described.

That at the time of the sale of said real estate by plaintiffs to defendants, and at the time of the execution and delivery of the deed hereinbefore first set out, the said defendants, Edward A. Reed and Hiram H. Henderson, paid of said purchase price the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash, and as for the remainder of the purchase price made their two certain promissory notes, bearing date at Ogden, Utah, March 26th, 1890, in the words and figures following:

$2,444.44. OGDEN, UTAH, *March 26th*, 1890.

On the 25th day of September, 1890, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred and forty-four $\frac{44}{100}$ dollars, at the Utah National Bank of Ogden, Utah, payable in U. S. gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.

Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON.

6 $2,444.45. OGDEN, UTAH, *March 26th*, 1890.

On the 26th day of March, 1891, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred forty-four $\frac{45}{100}$ dollars, at the Utah National Bank of Ogden, Utah, payable in gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.

Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON.

and then and there delivered said promissory notes to the plaintiffs.

That at the time of the delivery of the deed hereinbefore first set out and the delivery of the said promissory notes to the plaintiffs the said defendants, Edward A. Reed and Hiram H. Henderson, to secure the payment of said promissory notes and the interest thereon, as mentioned in the said promissory notes, according to the tenor thereof, did execute under their hands and deliver to the said plaintiffs a certain mortgage, bearing date of the 27th day of March, 1890, and conditioned for the payment of the said sums evidenced by the said promissory notes, and interest thereon at the rate and at the time and in the manner specified in said notes and according to the conditions thereof; which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 29th day of March, 1890, duly recorded in the office of the recorder of the county of Weber, Territory of Utah, in Book "O" of Mortgages, at page 314; which mortgage was in the words and figures following:

7 *Mortgage.*

Edward A. Reed and Millie G. Reed, his wife, and Hiram H. Henderson (unmarried), mortgagors, of Ogden City, Weber county, Utah Territory, hereby mortgages to Louis B. Adams and Watson N. Shilling, mortgagees, of Ogden City, Weber county, Utah Territory for the sum of forty-eight hundred and eighty-eight and $\frac{89}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory:

An undivided two-thirds of the east half of section nine, township six north of range two west of the Salt Lake meridian.

Also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of said southwest quarter.

This mortgage is given to secure the following indebtedness, to wit, two certain promissory notes of even date herewith, made by Edward A. Reed and Hiram Henderson, payable to L. B. Adams and W. N. Shilling or order, each for the sum of $2,444.44 and payable respectively on September 26th, 1890, and March 26th, 1891, with interest at the rate of eight per cent. per annum, interest pay-

able semi-annually. The above notes are given as part purchase price of above land.

The mortgagors agree to pay all taxes and assessments on said premises and the sum of $488.00 *dollars* attorneys' fees in case of foreclosure.

Witness the hands of the said mortgagors this twenty-seventh day of March, A. D. 1890.

EDWARD A. REED.
H. H. HENDERSON.

Signed in the presence of—
R. P. HUNTER.

That in said mortgage the property to be mortgaged was erroneously and by mistake described as lying in township (6) six north of range two (2) west of the Salt Lake meridian, when
8 it should have been described as lying in township five north of range two west of the Salt Lake meridian.

That said mistake was made by following the description in said mortgage that was given in the deed hereinbefore first set out.

That it was the intention of the defendants to mortgage to plaintiffs, and of plaintiffs to receive the mortgage upon the real estate in this complaint first above described and in the second deed herein set out described.

That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said — duly made and entered an order appointing the defendant George H. Burgitt guardian of the person and estate of the said defendant, Edward A. Reed, and he, the said defendant, George H. Burgitt, accepted the said appointment, and on the 22nd day of December duly qualified as such guardian, and the said George H. Burgitt is now such guardian of said defendant, Edward A. Reed.

Second. The said plaintiffs, further complaining against the said defendants, and for a second cause of action allege—

That heretobefore, to wit, at Ogden, Utah, on the 26th day of March, 1890, the defendants Edward A. Reed and Hiram H. Henderson made two certain promissory notes in writing in the words and figures following:

"$2,444.44 OGDEN, UTAH, *March 26th*, 1890.

On the 26th day of September, 1890, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred and forty-four $\frac{44}{100}$ dollars, at the Utah National Bank of Ogden, Utah, payable in U. S. gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.
9 Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON.

$2,444.45. OGDEN, UTAH, *March 26th*, 1890.

On the 26th day of March, 1891, for value received, we or either of us promise to pay to L. B. Adams and W. N. Shilling or order two thousand four hundred and forty-four $\frac{45}{100}$ —, at the Utah National Bank of Ogden, Utah, payable in U. S. gold coin, with interest, at the rate of eight per cent. per annum, from date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection.

Interest payable semi-annually.

E. A. REED.
H. H. HENDERSON."

and then and there delivered said promissory notes to the plaintiffs.

That to secure the payment of the said promissory notes and interest thereon, as mentioned in said promissory notes, according to the tenor thereof, the said defendants, Edward A. Reed and Hiram H. Henderson, did execute under their hands and delivered to the said plaintiffs a certain mortgage bearing date the 27th day of March, 1890, and conditioned for the payment of the said sums evidenced by said promissory notes and the interest thereon at the rate and at the time and in the manner specified in said notes, and according to the conditions thereof; which said mortgage was duly acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 29th day of March, 1890, duly recorded in the office of the county recorder of Weber county, Utah Territory, in Book "O" of Mortgages, at page 314; which said mortgage is the same mortgage set out in the first cause of action of this amended complaint and is the same mortgage for which reformation is asked by the first cause of action of this complaint, and which said mortgage is hereby referred to as a part of *of* this cause of action.

That the interest on the said principal sums mentioned in said promissory notes and in said mortgage has been paid down to September 26th, 1890, and nothing more has been paid thereon.

That on the 26th day of September, 1891, there was due on said notes and mortgage the sum of five thousand two hundred and eighty-seven and $\frac{75}{100}$ dollars; which sum, together with interest thereon, at the rate of eight per cent. per annum, from the 26th day of September, 1891, is still due and wholly unpaid.

That the plaintiffs are now the legal owners and holders of said promissory notes and mortgage, and the defendants Edward A. Reed and Hiram H. Henderson are still the owners of the real estate in this amended complaint first above described.

That on June 26th, 1891, the defendants Edward A. Reed and Hiram H. Henderson made and delivered to the Utah National Bank of Ogden, Utah, which was then the holder of said promissory notes, their certain promissory note for the sum of three hundred and ninety-one and $\frac{10}{100}$ dollars, whereby they or either of them promised to pay, on demand, to the Utah National Bank of Ogden, Utah, the sum of three hundred and ninety-one and $\frac{10}{100}$ dollars, with interest thereon, at the rate of twelve per cent. per annum, from

date until paid, both before and after judgment, and if not paid at maturity, ten per cent. additional for costs of collection; which note was to be in full payment of the interest of the said notes and mortgage.

That said note was never paid, and that plaintiffs are now the owners and holders thereof and herewith bring the same into court for the said defendants, Edward A. Reed and Hiram H. Henderson.

11 That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said day duly made and entered an order appointing George H. Burgitt guardian of the person and estate of the said defendant, Edward A. Reed, and the said defendant, George H. Burgitt, accepted the said appointment, and on the 22nd day of December duly qualified as such guardian, and on the last-mentioned day said probate court duly issued letters of guardianship to the said defendant, George H. Burgitt, as such guardian, and the said George H. Burgitt is now such guardian of the said defendant, Edward A. Reed.

That the defendant Millie G. Reed has or claims to have some interest in or claim upon said real property in this amended complaint first described, or some part thereof, as the wife of the said defendant, Edward A. Reed, which interest or claim is subsequent to and subject to the lien of the mortgage of plaintiffs.

Wherefore plaintiffs pray judgment against the said defendants:

First. That the mortgage in said amended complaint mentioned be reformed and corrected so as to describe the property in this amended complaint first described.

Second. That the usual decree may be made for the sale of the following tracts of land situate in Weber county, Utah Territory: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section; also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, by the United States marshal in and for the Territory of Utah, according to law and the practice of this court; that the proceeds of said sale may be applied,

12 first, in payment of the expenses and costs of said sale; second, the costs of this action; third, to the payment of the attorneys' fees fixed by said notes and mortgage; fourth, to the amounts due the plaintiffs on said promissory notes for principal and interest; and that said defendants and all persons claiming under them or either of them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in said premises and every part thereof, and that the said plaintiffs have judgment and execution against the said defendants, Hiram H. Henderson and Edward A. Reed, and against the estate of the said Edward A. Reed in the possession and under the control of said defendant, George H. Burgitt, as guardian aforesaid,

for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable thereto to the satisfaction of the sums due on said notes and mortgage, and costs and expense of sale and attorneys' fee.

Third. That the plaintiffs or any other party to the suit may become a purchaser at said sale; that the marshal, after the time allowed for redemption shall have expired, execute a deed to the purchaser; that the said purchaser be let into possession of the said premises upon the production of the marshal's deed therefor, and that the plaintiffs may have such other or further relief in the premises as to this court may seem meet and equitable.

KIMBALL AND ALLISON,
Attorneys for Plaintiffs.

TERRITORY OF UTAH, }
County of Weber, } ss:

Louis B. Adams, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing amended complaint; that the same is true of
13 his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

LOUIS B. ADAMS.

Subscribed and sworn to before me this 16th day of April, 1892.

[NOTARIAL SEAL.]

J. T. SMITH,
Notary Public.

14 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. Reed, His Wife; Hiram H. Henderson and George H. Burgitt, Gaurdian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.
} Answer to Amended Complaint.

Come now the defendants in the above-entitled action and, in answer to plaintiffs' first cause of action as set forth in the amended complaint, allege—

That they have no information or belief sufficient to enable them to answer the allegations in the plaintiffs' amended complaint as to whether the plaintiffs on the 27th day of March, 1890, or at any other time were the owners, in the possession of, or entitled to the possession of the following-described real estate situate, lying, and being in Weber county, Utah Territory, to wit: An undivided two-

thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, and therefore and upon this ground
15 these defendants deny that said plaintiffs on the 27th day of March, 1890, or at any other time were the owners and in the possession and entitled to the possession of the above-described real estate.

Deny that said plaintiffs sold the above-described real estate or any part of the same to Edward A. Reed and Hiram H. Henderson for the price of seven thousand three hundred and thirty-three and $\frac{34}{100}$ dollars or for any other sum or at all.

Admit that the plaintiffs executed the warranty deed which is set out in the plaintiffs' first cause of action and which is duly witnessed, acknowledged, and recorded in the office of the county recorder of Weber county, Utah Territory.

Deny that by said deed the plaintiffs intended to convey to the defendants Edward A. Reed and Hiram H. Henderson or either of them the real estate which is first set out in the plaintiffs' first cause of action or any part of the same or at all.

Deny that the defendants Edward A. Reed and Hiram H. Henderson have ever or at any time or at all been in the possession of said real estate or any part of the same or at all.

And the defendants, further answering said amended complaint, allege that they have no information or belief sufficient to enable them to answer the paragraph in the plaintiffs' amended complaint which reads as follows:

"That the plaintiffs, so soon as they discovered the mistake made in said deed hereinbefore set out, in the description of the property intended to be granted thereby, to wit, on the 29th day of September, 1891, made a certain other deed, executed by themselves and their wives, in the words and figures following:

Quitclaim Deed.

Louis B. Adams and Louisa M. Adams, his wife; Watson N. Shilling and Angie Shilling, his wife, grantors, of Ogden City,
16 Weber county, Utah Territory, hereby convey and quitclaim unto Edward A. Reed and Hiram H. Henderson, grantees, of Ogden City, Weber county, Utah Territory, for the sum of seven thousand three hundred and thirty-three and $\frac{34}{100}$ dollars, the following-described tract of land in Weber county, Utah Territory: An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section.

Said grantors hereby covenant and agree to and with the said grantees that the said property was, on the 27th day of March, A. D. 1890, free and clear of all incumbrances of whatsoever description,

and said grantors were then seized in fee-simple of said property, and they further agree and covenant to and with the said grantees that they have not since the said day incumbered or transferred the title of the said property to any person whomsoever.

This deed is made to correct a certain other deed, made by said grantors to said grantees on the 27th day of March, 1890, in which deed the description of said property read township six instead of township five, when it was the intention of all the parties to said deed that it should read township five instead of six.

Witness the hands of said grantors this 29th day of September, 1891.

LOUIS B. ADAMS.
W. N. SHILLING.
ANGIE SHILLING.
LOUISA M. ADAMS.

Witness:
J. A. KIMBALL.

Which deed was duly witnessed, acknowledged, and certified so as to entitle it to be recorded, and on said day tendered said
17 deed and the sum of $1.50, the recorder's fee for recording the same, to said defendants, Edward A. Reed and Hiram H. Henderson, and which deed plaintiffs bring into court for said defendants; that said last deed was made for the purpose and with the intention to correct a mistake in the description in the first deed herein set out; that at the time of the execution of said first deed herein set out it was the intention of the plaintiffs and the defendants Edward A. Reed and Hiram H. Henderson that the said deed should convey the property hereinbefore first described and in the second deed herein set out and described;" and therefore and upon this ground these defendants deny that said plaintiffs executed the alleged quitclaim deed; deny that said quitclaim deed was made for the purpose and with the intention to correct the mistake in the description of the first deed set out in plaintiffs' first cause of action; deny that at the time of the execution of the first deed in plaintiffs' first cause of action set out that it was the intention of the plaintiffs or either of them and the defendants Edward A. Reed and Hiram H. Henderson or either of them that said deed should convey the property first described in the plaintiffs' first cause of action or any part of the same or at all.

Defendants admit that at the time of the execution of the deed first set out in plaintiffs' first cause of action the defendants Edward A. Reed and Hiram H. Henderson paid the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash to the plaintiffs and executed their certain promissory notes for the sum of two thousand four hundred and forty-four and $\frac{45}{100}$ dollars each, and also executed a mortgage upon the land described in said mortgage, and which is fully set out in plaintiffs' first cause of action, to secure the payment of said notes.

18 And defendants, further answering the plaintiffs' amended complaint, allege that they have no information or belie

sufficient to enable them to answer the allegations of the plaintiffs' amended complaint as to whether the property described in said mortgage was erroneously and by mistake described as lying in township six north of range two west of the Salt Lake meridian when it should have been described as lying in township five north of range two west of the Salt Lake meridian, or whether the said mistake was made by following the description in said mortgage that was given in the deed, or whether it was the intention of the defendants or either of them to mortgage to the plaintiffs or of the plaintiffs to receive the mortgage upon the real estate first described in plaintiffs' first cause of action, and therefore and upon this ground these defendants deny that said property first described in the mortgage was erroneously and by mistake described, as set forth in plaintiffs' first cause of action, and deny that said first alleged mistake was made by following the description of the deed set out in plaintiffs' first cause of action, and deny that it was the intention of the defendants or either of them and the plaintiffs or either of them to mortgage any property at all except as set forth in said mortgage.

Second.

And the defendants, in answer to plaintiffs' second cause of action, as set forth in plaintiffs' amended complaint, admit that the defendants Edward A. Reed and Hiram H. Henderson on the 26th day of March, 1890, made and executed their two certain promissory notes in writing, one for the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, and one for the sum of two thousand four hundred forty-four and $\frac{45}{100}$ dollars, to Louis B. Adams and Watson N. Shilling, which became due in six months and one year after date, respectively; an- defendants further admit that the said defendants, Edward A. Reed and Hiram H. Henderson, made and executed a certain mortgage, as set forth in plaintiffs' second cause of action, to secure said notes, but these defendants deny that on the 26th day of September, 1891, or at any other time there was due on said notes and mortgage the sum of five thousand two hundred eighty-seven and $\frac{77}{100}$ dollars or any sum whatever or at all, for the reason that said notes and mortgage were obtained by fraud and misrepresentation on the part of the plaintiffs, Louis B. Adams and Watson N. Shilling, and which is hereafter more fully set out.

19

As to the allegations that "the plaintiffs are now the lawful owners and holders of said notes and mortgage," these defendants say that they have no information or belief sufficient to enable them to answer the said allegations, and therefore and upon this ground deny that said plaintiffs are now the owners and entitled to the possession of said notes and mortgage or either of them or at all.

And the defendants Edward A. Reed and Hiram H. Henderson deny that they are still the owners of the real estate first set forth in this amended complaint or ever have been such owners or at all.

Defendants deny that Millie G. Reed claims or ever has claimed

any right, title, or interest to the real property first described in the plaintiffs' first cause of action or any part thereof or at all.

And the defendants, further answering plaintiffs' amended complaint and as a further answer thereto, allege that on or about the 27th day of March, 1890, plaintiffs, Louis B. Adams and Watson N. Shilling, represented to the defendants Edward A. Reed and
20 Hiram H. Henderson that they owned and had a good title in fee-simple to four hundred and forty acres of land lying west of Ogden City about three and one-half miles; that the defendants Edward A. Reed and Hiram H. Henderson, relying upon and believing and acting upon the representations of said plaintiff and without investigating the title of said land, and also without seeing said land, purchased an undivided two-thirds interest of said four hundred and forty acres for the sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars and received the alleged warranty deed as first set out in plaintiffs' first cause of action; that of said sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars they paid the plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash and executed their two certain promissory notes for the two thousand four hundred forty-four and $\frac{45}{100}$ dollars each, bearing 8 % interest and payable in six months and one year from March 26th, 1890, which said notes were secured by a mortgage bearing the same date as said notes and upon the land first described in the warranty deed in the plaintiff amended complaint, and that said mortgage was duly signed, witnessed, and acknowledged; and that the defendants Edward A. Reed and Hiram H. Henderson, relying upon and fully believing and acting upon the repr-sentations of plaintiffs that they, the plaintiffs, were seized of a good and indefeasible estate in fee-simple of the above-described land, paid the interest on said notes, which amounted to the sum of one hundred and forty-four and $\frac{66}{100}$ dollars, down to and including September 26th, 1890; that they also executed their promissory note on the 26th day of June, 1891, payable to the Utah National Nank of Ogden, for the sum of three hundred and ninety-one and $\frac{10}{100}$ dollars, as the interest on said notes hereinbefore described.

That thereafter, and before the filing of the complaint in this action, defendants Edward A. Reed and Hiram H. Hender-
21 son ascertained and now allege that the plaintiffs were not the owners of and did not have a good and indefeasible estate in fee-simple to the said land first described in the plaintiffs' warranty deed to them, which deed is fully set out in the plaintiffs' first cause of action, or any title at all, and that no title *waht*soever in or to said lands was conveyed to said Reed and Henderson.

That thereupon the defendants Reed and Henderson demanded back from said plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, with interest from March 27th, 1890, at the rate of eight per cent. per annum, to November 10th, 1890; and also interest on two thousand six hundred twenty-four and $\frac{74}{100}$ — from November 10th, 1890, at the rate of eight per cent. per annum; and also the two notes of two thousand four hundred forty-four

and $\frac{45}{100}$ dollars each, and bearing date of March 27th, 1890, and becoming due in six months and one year respectively after date; and also one note of three hundred ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, and becoming due on demand, by surrendering and delivering up the same to them, the said Edward A. Reed and Hiram H. Henderson.

These defendants further allege that the representations of the plaintiffs in regard to the ownership of said land, that they, the plaintiffs, had a good and indefeasible estate in fee-simple, were false and fraudulent, and that the plaintiffs did then and there know that such representations and allegations were false and fraudulent; that they did not have at that time, or at any time, such a title as represented.

That these defendants, Edward A. Reed and Hiram H. Henderson, relied upon and fully believed and acted upon such allegations and representations of the said plaintiffs, and did purchase and pay for said land the price above specified, and that such representations were untrue and false, and that the plaintiffs then and there
22 knew that such representations were false and fraudulent and untrue and were made to deceive the defendants, and that the plaintiffs did not have a good and indefeasible estate in fee-simple of said land or any title whatever to said land; and defendants further allege that if the representation of the plaintiffs had in fact been true, that the defendants Edward A. Reed and Hiram H. Henderson could have sold said land long since for a much higher price than they paid for the same, and that they have been damaged by such false and fraudulent representations in the sum of seven thousand dollars.

Defendants further allege that the plaintiffs have not now or at any time or at all have had a good and indefeasible estate in fee-simple to the property first described in the plaintiffs' first cause of action, or to the property first described in the first deed as set forth in said first cause of action of said amended complaint.

Wherefore these defendants pray that this cause be dismissed as against them, together with their costs.

Cross-complaint.

And the said defendants, by way of cross-complaint against the said plaintiffs, Louis B. Adams and Watson N. Shilling, complain and allege—

That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said day duly made and entered an order appointing the defendant George H. Burgitt, who is plaintiff in this cross-complaint, guardian of the person and estate of said defendant, Edward A. Reed, and he, the said defendant, George H. Burgitt, accepted the said appointment and on the 22nd day of December duly qualified as such guardian, and on the last mentioned day said probate court duly issued letters of guardianship

to the *the* defendant George H. Burgitt as such guardian,
23 and the said George H. Burgitt is now such guardian.

That on or about the 27th day of March, 1890, the plaintiffs, Louis B. Adams and Watson N. Shilling, represented to the defendants Edward A. Reed and Hiram H. Henderson that they owned and had a good title in fee-simple to four hundred and forty acres of land lying west of Ogden City about three and one-half miles.

That the defendants Edward A. Reed and Hiram H. Henderson, relying upon and believing and acting upon the representations of said plaintiffs, and without investigating the title of said land, and also without seeing said land, purchased an undivided two-thirds interest for the sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars, and received the alleged warranty deed as first set out in the plaintiffs' first cause of action, which land is described as follows in said deed:

An undivided two-thirds of the east half of section nine (9), township six (6) north of range two (2) west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section; also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, in Weber county, Utah.

That of said sum of seven thousand three hundred thirty-three and $\frac{34}{100}$ dollars they paid the plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars in cash and executed their two certain promissory notes for the sum of two thousand four hundred forty-four and $\frac{45}{100}$ dollars, each bearing interest at 8 %, payable in six months and one year from March 26th, 1890, which said notes were secured by a mortgage, bearing the same date of said notes, upon the land as first described in the warranty deed first set out in the plaintiffs' first cause of action, which said land has hereinbefore been fully described.

24 That said mortgage was duly signed, witnessed, and acknowledged; that the defendants Edward A. Reed and Hiram H. Henderson, relying upon and fully believing and acting upon the representations of plaintiffs, that they, the plaintiffs, were seized of a good and indefeas*a*ble estate in fee-simple of the above-described land, paid the interest on said notes, which amounted to the sum of one hundred forty-four and $\frac{66}{100}$ dollars, down to and including September 26th, 1890; that they also executed their promissory note on June 26th, 1891, payable to the Utah National Bank of Ogden, for the sum of three hundred ninety-one and $\frac{10}{100}$ dollars, as the interest on said notes hereinbefore described.

That thereafter and before the filing of the cross-complaint in this action the defendants Edward A. Reed and Hiram H. Henderson ascertained and now allege that the plaintiffs were not the owners of and did not have a good and indefeas*a*ble estate in fee-simple of said land first described in plaintiffs' deed to them, or any title at all, and that no title whatever in or to said land was conveyed to said Reed and Henderson.

That thereupon the defendants Edward A. Reed and Hiram H.

Henderson demanded back from said plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, with interest thereon from March 27th, 1890, at the rate of eight per cent. per annum, to November 10th, 1890, and also interest on two thousand six hundred twenty-four and $\frac{74}{100}$ dollars from November 10th, 1890, at the rate of eight per cent. per annum, and also the two notes of two thousand four hundred forty-four and $\frac{45}{100}$ dollars each and bearing date of March 27th, 1890, and becoming due in six months and one year respectively, and also one note of three hundred ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, and becoming due on demand, by surrendering and delivering the same up to them, the said Edward A. Reed and Hiram H. Henderson, which said plaintiffs refused to do.

25 These defendants further allege that the representations of the plaintiffs in regard to the ownership of the said land, that they, the plaintiffs, had a good and indefeasible estate in fee-simple, were false and fraudulent, and that the plaintiffs did then and there know that such representations were false and fraudulent and untrue and were made to deceive these defendants; that they did not have at that time or at any time since such a title as represented; that these defendants, Edward A. Reed and Hiram H. Henderson, relied upon and fully believed and acted upon such allegations and representations of said plaintiffs and did purchase and pay for said land the price above specified, and that such representations and allegations were untrue and false, and that the plaintiffs did not have a good and indefeasable estate in fee-simple of said land or any title whatever to said land; and the defendants further allege that if the representations of the plaintiffs had in fact been true, that the defendants Edward A. Reed and Hiram H. Henderson could have sold said land long since for a much higher price than that paid for the same, and that they have been damaged by such false and fraudulent representations of the plaintiffs in the sum of seven thousand dollars.

Defendants further allege that the plaintiffs have not now or at any time or at all had a good and indefeasable estate in fee-simple of the property first described in plaintiffs' complaint, and which is first described in this cross-complaint, or property described in the first deed of said plaintiffs' complaint.

26 Wherefore these defendants pray that the above mortgage and notes be cancelled and delivered up to the defendants Edward A. Reed and Hiram H. Henderson; that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the person and estate of Edward A. Reed, a person incapable of conducting his own affairs, recover of the said plaintiffs the sum of two thousand four hundred forty-four and $\frac{44}{100}$ dollars, with interest on same from March 27th, 1890, to November 10th, 1890, at the rate of eight per cent. per annum, and also interest on two thousand six hundred and twenty-four and $\frac{74}{100}$ dollars from November 10th, 1890, and also costs of suit and seven thousand dollars damages.

And the defendants pray for such other and further relief as to this court may seem meet and equitable.

BROWN & HENDERSON,
Attorneys for Defendants.

TERRITORY OF UTAH, } ss:
County of Weber, }

Hiram H. Henderson, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and cross-complaint to the amended complaint of the plaintiffs herein, and that the same is true of his own personal knowledge except as to those things therein stated on information and belief, and as to those matters he believes it to be true.

H. H. HENDERSON.

Subscribed and sworn to before me this 30th day of June, 1892.

____ ____,
Notary Public.

27 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
E. A. REED & H. H. HENDERSON *et al.*, Defendants. } Stipulation.

It is hereby stipulated between the parties to the above-entitled action that all the allegations in the cross-complaint of the defendants are hereby denied without filing an answer thereto; and it is further stipulated and agreed that the allegations in defendants' answer and cross-complaint are sufficient to put in issue any defect or defects in plaintiffs' title to part or all the real estate described in plaintiffs' amended complaint that may now or have heretofore existed against the same, and all proper evidence may be introduced by either the plaintiffs or defendants either in support or in derrogation of said title, notwithstanding the defects to said title may not have *neen* specifically pleaded in the answer and cross-complaint.

BROWN & HENDERSON AND
H. H. HENDERSON,
Attorneys for Defendants.
JAMES N. KIMBALL AND
E. M. ALLISON, JR.,
Attorneys for Plaintiffs.

Dated June 6th, 1894.

28 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

Fourth District Court, Utah.

Filed July 21, 1894. K. S. Boreman, Clerk.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.

To the court:

The undersigned, special master in chancery and referee in the above-entitled action, herewith transmits his findings of fact and conclusions of law in said cause, together with form of decree, and he reports that the attorneys upon both sides agreed, and their agreement was entered by the stenographic reporter in the minutes of the proceedings, that the referee should have and be entitled to twenty-five dollars for the first day and fifteen dollars for each succeeding day in which he was engaged in the hearing of said cause; that the hearing, including the time of making the findings, occupied at least two days. His fees thereby are forty dollars.

Respectfully submitted.

JACOB S. BOREMAN,
Special Master in Chancery and Referee.

July 21st, 1894.

29 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.

Finding of Facts and Conclusions of Law.

On motion of James N. Kimball, Esq., attorney for the plaintiffs, and by consent of H. H. Henderson, Esq., attorney for defendants, and pursuant to law in that behalf, it is ordered that this cause be, and it is hereby, referred to Jacob S. Boreman, Esq., as a special master in chancery, to try, *and* and all issues, whether of law or fact, and make findings of fact and conclusions of law and a form of decree, and make due report thereof to the court.

JAMES A. MINER, *Judge.*

Dated June 23rd, 1894.

Upon the authority of the above and foregoing order of the court and by agreement of the parties, this cause came on regularly to be heard the second day of July, A. D. 1894, before the above-named Jacob S. Boreman, special master in chancery, upon the
30 amended complaint, filed therein on the 16th day of April, 1892, and the answer and cross-complaint, filed June 3rd, 1892, and upon the stipulation of the parties, filed June 6th, 1894, Messrs. Kimball and Allison appearing for the plaintiffs and H. H. Henderson, Esq., and Messrs. Richards and Macmillan for the defendants; whereupon oral and documentary evidence and agreements made and entered of record before said special master in chancery, Jacob S. Boreman, were introduced by the respective parties in support of the allegations of their pleadings, and from the evidence and stipulations introduced said special master finds the following facts, to wit:

I.

That on March —, 1890, the defendants Edward A. Reed and Hiram H. Henderson inquired of the plaintiffs, Watson N. Shilling and Louis B. Adams, as to whether they owned and had a good title to a tract of land west of Ogden City, Weber county, Utah Territory, and that said Watson N. Shilling and Louis B. Adams then and there informed said Reed and Henderson that they owned and had a good title in fee-simple to four hundred and forty acres of land lying west of Ogden City about three and one-half miles.

II.

That the tract of land referred to in finding "I," and which said plaintiffs said they owned and to which they said they had a good title in fee-simple, is described as follows:

The east half of section nine, township five north of range two west of the Salt Lake meridian; the south half of the southwest quarter of said section, and the northeast quarter of the southwest quarter of said section.

III.

31 That the defendants Edward A. Reed and Hiram H. Henderson had not seen the land and were not acquainted with the title, but that plaintiffs promised that they would furnish said Reed and Henderson with an abstract of title to said land; that the defendants Reed and Henderson relied upon and believed and acted upon the representations of the said plaintiffs that they had a good and indefeasable estate in fee-simple to the same, and without investigating the title of said land purchased an undivided two-thirds interest in four hundred and forty acres for the sum of seven thousand three hundred and thirty-three and $\frac{32}{100}$ dollars, one-third of which, to wit, two thousand four hundred and forty-four and $\frac{44}{100}$ dollars, was to be paid in cash, and time was given for the payment of the residue, with interest; which purchase of said land the defendants would not have made if they had not believed the rep-

resentations of the plaintiffs that they had a good and indefeasible title to said land; that the representations made by said Adams and Shilling as aforesaid to said Reed and Henderson were untrue.

IV.

That on the 27th day of March, 1890, Reed and Henderson received from Adams and Shilling a deed of general warranty of said last-named date for the following-described land:

An undivided two-thirds of the east half of section nine, township six north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, in Weber county, Utah.

V.

32 That the plaintiffs, by the deed mentioned in finding No. IV, intended to convey to defendants an undivided two-thirds of the land described in finding No. II, and defendants purchased and intended to purchase of plaintiffs an undivided two-thirds of the land described in finding No. II.

VI.

That by mistake of the scrivener who prepared said deed the land was described as lying in township six instead of township five north *or* range two west of the Salt Lake meridian.

VII.

That said defendants, Reed and Henderson, at the time of receiving said deed mentioned in finding No. 4, paid to the plaintiffs, Adams and Shilling, one-third of the purchase price of the land intended to be purchased, to wit, two thousand four hundred and forty four and $\frac{44}{100}$ dollars, of the purchase-money in cash, and executed their two certain promissory notes in favor of Adams and Shilling for the sum of two thousand four hundred and forty-four and $\frac{44}{100}$ dollars each, bearing eight per cent. interest and payable one year and six months from March 26, 1890; which said notes were secured by a mortgage back on the same land for the residue of the purchase-money; which land was also described in said mortgage, by mistake of the scrivener who prepared the same, as lying in township six instead of township five north of range two west of the Salt Lake meridian, when it was intended to be described as lying in said township five.

VIII.

That said mortgage was duly signed, witnessed, and acknowledged; that the defendants Edward A. Reed and Hiram H. Henderson relied upon and fully believed and acted upon the representa-
33 tions of plaintiffs that they, the plaintiffs, were seized of a good and indefeasible estate in fee-simple of the above-de-

scribed land and paid to Adams and Shilling the interest of said notes, which amounted to the sum of $180.00, down to and including September 26th, 1890; that they also executed their certain promissory note of June 26th, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, as the interest on said notes hereinbefore described, said bank being then and there the holder of said promissory notes first above mentioned.

IX.

That the note mentioned in finding No. VIII, as executed by defendants June 26th, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, was brought into court when plaintiffs filed their complaint in this action for defendants, and is still so in court for the defendants.

X.

That plaintiffs failed to furnish any abstract for any land whatever, and that defendants, having an opportunity to make a sale of the land in township five, said section and range, and which was the land intended to be conveyed by Adams and Shilling to Reed and Henderson, procured an abstract for themselves on the third of September, 1891, for the last-named land.

XI.

That the lands described in finding two are in Weber county, Utah, and are within ten miles of the line of the Union Pacific railroad, and are within the limit of lands granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862; that the lands in controversy are and have been heretofore used and cultivated as agricultural lands and lie in a valley at the base of the Wasatch mountains, and that no exploration nor examination has ever been made on said lands for coal or minerals of any kind or description.

34 XII.

That on April 16th, 1867, the Union Pacific Railroad Company conveyed to Cyrus H. McCormick and John Duff, as trustees, by way of mortgage, all the lands granted to it by the act of Congress approved July 1st, 1862, and the act amendatory thereof, approved July 2nd, 1864, to secure the payment of ten millions of dollars, and by said mortgage gave said trustees power and authority to release the lien created by said mortgage upon any particular tract or parcel of land upon the paying of the purchase price therefor.

And also gave power, in case of a vacancy happening in the number of trustees, to the remaining trustees to do all acts while said vacancy exists, and to have all the rights and exercise all the powers and discharge the duties devolving on the said trustees, and gave said remaining trustees power and authority to fill such vacancy; that on December 18th, 1873, the said Union Pacific Railway Com-

pany conveyed by way of mortgage to the Union Trust Company of New York all of its right, title, and interest in and to all the lands granted by the acts of Congress aforesaid, subject to the mortgage of McCormick and Duff, as aforesaid, with the same authority as to releasing as *are* stated above as contained in said mortgage to McCormick and Duff, as trustees, and further provided that the trustees under said first mortgage had power and authority to release the lien created by this mortgage by joining in deed with the Union Pacific Railroad Company.

XIII.

That on October 20th, 1873, John Duff appointed Frederick L. Ames trustee and a joint tenant in trust with himself to the lands described in the first mortgage mentioned in finding No. 12, to succeed Cyrus H. McCormick, who had resigned his position as trustee under the said mortgage.

35 XIV.

That the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee under the first mortgage described in finding No. 12, by warranty deed dated December 11th, 1883, and acknowledged June 16th, 1884, and recorded Feb. 4th, 1885, conveyed to William Van Dyke the northwest quarter of the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian, and said Frederick L. Ames being then and there the remaining trustee under said first mortgage, the other trustee, John Duff, having on February 14th, 1877, resigned his position as trustee under said first mortgage, and the said Ames by said conveyance released said last-described land from the lien of both mortgages described in finding 12. Said warranty deed reserved to said company so much of said land (if any) as is within 100 feet of the railroad and contained a condition for grantees to build fences on said land (if any) adjoining said railroad.

XV.

That on July 2nd, 1887, the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, as stated in the last finding, by warranty deed conveyed to John Selman the northeast quarter of the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian; that by said conveyance said Ames released said land from the lien of the two mortgages mentioned in finding No. 12, and that on January 22nd, 1886, William Van Dyke by warranty deed conveyed to the plaintiffs, Adams and Shilling, the northwest quarter of the northeast quarter of said section nine, township five north of range two west of the Salt Lake meridian, and that on September 27th, 1887, John Selman by warranty deed conveyed to Adams and Shilling the northeast quarter of the northeast quarter of said section; that the deed

in this finding first mentioned from the Union Pacific Rail-
36 road Company and Frederick L. Ames, trustee, to John Selman contained the same reservation of land within 100 feet of the railroad and the same conditions as to fences as were in the deed mentioned in finding No. 14.

XVI.

That on October 18, 1889, the Union Pacific Railroad Company and the Union Trust Company, trustee, by warranty deed conveyed to plaintiffs, Adams and Shilling, the south half of the northeast quarter, the east half of the southwest quarter, and the southeast quarter of section nine, township five north of range two west of the Salt Lake meridian, "reserving, however, to the said Union Pacific Railroad Company the exclusive right to prospect for coal and other miner-*las* within and underlying said lands, and to mine for and to remove the same if found, and for this purpose it shall have the right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor," and that on June 4th, 1888, the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, by warranty deed conveyed to the plaintiffs, Adams and Shilling, the southwest quarter of the southwest quarter of section nine, township five north of range two west of the Salt Lake meridian; that the said Union Trust Company in said conveyance of October 18th, 1889, purported to release the lands described in said conveyance and as described in this finding from the lien of both mortgages described in finding No. 12, subject only to the reservation contained in said deed, as herein set forth, and said Frederick L. Ames, remaining trustee by said conveyance of June 4th, 1888, purported to release the lands described therein and herein from the lien of both mortgages described in finding No. 12.

37 XVII.

That on July 2nd, 1889, Frederick L. Ames, by an instrument of that date, appointed the Union Trust Company of New York co-trustees with himself under the first mortgage mentioned in finding 12, and on July 13th, 1889, by an instrument in writing conveyed to the Union Trust Company of New York all his title as joint tenant in the property held by him under said first mortgage described in finding No. 12; which conveyance was accepted by said Union Trust Company, and on July 15th, 1889, the said Ames resigned his place as trustee under the said first mortgage described in finding No. 12.

XVIII.

That no patent has ever issued from the Government for the land intended to be conveyed by Adams and Shilling to said Reed and Henderson in township five, section nine north of range two west, of the Salt Lake meridian; that the plaintiffs did not hold under patent and plaintiffs had no title to the land described in the deed

made by them to said Reed and Henderson for the land mentioned in finding 4, and land described in finding 4 was not the land intended to be conveyed; that the parties who had applied to Reed and Henderson for the purchase of the land described in finding 2 declined and refused to buy and the sale was defeated.

XIX

That within two days of the third day of September, 1891, and before the bringing of this action by plaintiffs, the defendants Edward A. Reed and Hiram H. Henderson ascertained that the plaintiffs were not the owners of and had no title whatever in or to said land which said deed from plaintiffs purported to convey to these defendants; that the deed that Adams and Shilling had given to these defendants purported to convey land in section nine and township six north of range two west of the Salt Lake me-
38 ridian, and which was never owned by plaintiffs, and that the land intended to be conveyed was located in township five, in said section nine and said range two.

XX.

That on or about the 4th day of September, 1891, the defendants Edward A. Reed and Hiram H. Henderson notified said Adams and Shilling that they (Reed and Henderson) rescinded said contract of sale, and they demanded back from said plaintiffs the sum of two thousand four hundred and forty-four and $\frac{44}{100}$ dollars, with interest thereon from March 27th, 1890, at the rate of eight per. cent per annum, and also interest on two thousand six hundred and twenty-four and $\frac{74}{100}$ dollars from November 10th, 1890, at the rate of eight per cent. per annum, and also the two notes of two thousand four hundred and forty-four and $\frac{45}{100}$ dollars each, bearing date of March 27th, 1890, and also one note of three hundred and ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, all of which said notes had been returned by said bank to Adams and Shilling, and demanded the surrender and delivery of the same to them.

XXI.

That after Reed and Henderson had notified Adams and Shilling that they (Reed and Henderson) rescinded said contract of sale, and before the bringing of this action, Adams and Shilling tendered another deed to them, a special warranty deed, but which contained a proper description of the land intended to be conveyed, and which deed Reed and Henderson refused to receive, saying that they (Reed and Henderson) rescinded the contract of sale; that Adams and Shilling did not have a good title to the land that was described in said last deed, and also that the deed was not one of general warranty; that said deed was dated on September 29th, 1891, and at the time of its tender one dollar and fifty cents were tendered to pay for the recording.

39 XXII.

That at the time, to wit, September 29th, 1891, that Adams and Shilling tendered the deed for the land described as follows: "The northeast quarter, the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest quarter of section nine, in township five north of range two west of the Salt Lake meridian, United States survey," to Reed and Henderson the title to the land was so incumbered by reservation in the Union Pacific Railway Company deed of date October 8th, 1889, to Adams and Shilling, which reads as follows: "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land, and to mine for and remove the same, if found, and for this purpose it shall have the right of way over and across said lands and space necessary for the conduct of said business thereon without charge or liability or damage therefor."

XXIII.

That the Union Pacific Railroad Company executed and delivered to the plaintiffs a quitclaim deed dated November 2nd, 1891, and acknowledged on the 17th day of November, 1891, and duly recorded on the 8th day of January, 1892, releasing the land intended to be conveyed from the claim of the said company on coal, under the coal reservation in the deed specified in finding XXII.

XXIV.

That the plaintiffs in this action rely for their title upon an act of Congress of July 1st, 1862, and the act amendatory thereto, under which the land in controversy (and which is described in the quitclaim deed from Adams and Shilling of September 29th, 1891, to Reed and Henderson), with other lands, were granted to the Union Pacific Railway Company.

40 XXV.

The plaintiffs base their claim of title to the property intended to be conveyed, and which is described in finding 2, upon the conveyances and instruments in writing introduced in evidence by them; that said lands described in finding 2 have never been patented by the United States of America to the Union Pacific Railroad Company, under which plaintiffs claim, and no patent is of record in Weber county, Utah Territory; that all of said lands are situated in Kanesville precinct, five or six miles from Ogden City.

XXVI.

That on the 28th day of March, 1890, the defendants Reed and Henderson let, leased, and demised unto the plaintiffs, Adams and Shilling, who were occupying said lands, for the term of six months

from said date, an undivided two-thirds of the lands described in finding No. 2; that defendants never actually occupied any of said land.

XXVII.

That neither of the notes described in the amended complaint and in the mortgage of the defendants E. A. Reed and H. H. Henderson of March 27th, 1890, have been paid, and the plaintiffs in this action are still the owners and holders of said notes and said mortgage; that the amount unpaid on said notes is the principal of each note, with interest from September 26th, 1890, at the rate of eight per cent. per annum.

XXVIII.

That on the 18th day of December, 1891, the said defendant, Edward A. Reed, was duly adjudged by the probate court in and for Weber county, Utah Territory, to be a person incapable of conducting his own affairs, and on said — duly made and entered an order appointing the defendant George H. Burgitt, who is plaintiff in this cross-complaint, guardian of the person and estate of the said
41 defendant, Edward A. Reed, and he, the said defendant, George H. Burgitt, accepted the said appointment, and on the 22nd day of December duly qualified as such guardian, and on said last-mentioned day said probate court duly issued letters of guardianship to the defendant George H. Burgitt as such guardian, and the said George H. Burgitt is now such guardian of such estate.

As conclusions of law from the foregoing facts, the court hereby now finds and decides:

1. That the plaintiffs intended to convey to the defendants Edward A. Reed and Hiram H. Henderson the following tract of land, to wit: "An undivided two-thirds of the east half of section nine, township five north of range two west of the Salt Lake meridian; also an undivided two-thirds of the south half of the southwest quarter of said section, and also an undivided two-thirds of the northeast quarter of the southwest quarter of said section, Weber county, Utah."

2. That the plaintiffs have not now nor never did have a good title in fee-simple to the above-described land, and that the several notes given by the defendants to the plaintiffs, including the note given to the bank and the sums of money paid by defendants to the plaintiff, were all without consideration.

3. That the representations made by plaintiffs to Edward A. Reed and Hiram H. Henderson concerning the title of said land were untrue and a fraud in law upon said defendants.

4. That the title of the Union Pacific Railway Company to the land in controversy is not a good title, but is encumbered, and what title it has may be defeated at any time by the United States before the issuance of patent.

42 5. That the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, are entitled to recover from the plaintiffs in this action the three certain promissory notes of Reed and Henderson—one for two thousand four hundred and forty-four and $\frac{44}{100}$ dollars, bearing date of March 26th, 1890, and becoming due on September 25th, 1890; also one note for two thousand four hundred and forty-four and $\frac{45}{100}$ dollars, bearing date of March 26th, 1890, an- becoming due on the 26th day of March, 1891, and also one note for three hundred and ninety-one and $\frac{10}{100}$ dollars, bearing date of June 26th, 1891, and becoming due on demand—and that said plaintiffs deliver to said defendants, George H. Burgitt and Hiram H. Henderson, said notes; and that said defendants Henderson and Burgitt, as guardian aforesaid, recover from said plaintiffs, Louis B. Adams and Watson N. Shilling, the sum of $3,520.00 *dollars* and costs of suit, and that a decree be entered accordingly

That the deed of plaintiffs to defendants, dated March 27th, 1890, conveyed nothing of value.

That the quitclaim deed of November, 1891, from the U. P. Railway Company to Adams and Shilling did not release the rights of the company to enter upon the land and explore for minerals other than coal.

That the United States held and retained the right to explore and authorize the exploration of said lands for minerals other than coal, and if found the grant to the railroad company would not pass to the company any title to said land until patent issued.

JACOB S. BOREMAN,
Special Master in Chancery and Referee.

July 21st, 1894.

Found and approved this 21st day of July, 1894.

43 In the District Court in and for the Fourth Judicial District of the Territory of Utah, County of Weber.

Fourth District Court.

Filed July 21, 1894. K. S. Boreman, Clerk.

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiffs, *vs.* EDWARD A. REED, MILLIE G. REED, HIRAM H. Henderson, and George H. Burgitt, as Guardian of the Estate and Person of Edward A. Reed, a Person Incompetent to Manage His Own Affairs, Defendants.	Judgment and Decree.

This cause having been heretofore, to wit, on the twenty-third day of June, A. D. 1894, *been* referred by the court, on consent of the parties to this action, to Jacob S. Boreman, as special master in chancery, to try the issues and to make findings of fact and conclu-

sions of law, and said special master in chancery having tried said issues as raised by the complaint and answer and cross-complaint, and the stipulation filed by the parties herein, and said report and findings of fact and conclusions of law having been this 21st day of July, A. D. 1894, filed with this court, and this court, from said report, findings of fact, and conclusions of law, having found its findings of fact and conclusions of law and ordered judgment to be entered in accordance with said conclusions of law: now, therefore, it is ordered, adjudged, and decreed:

1. That the contract of sale made by the plaintiffs to the defendants Hiram H. Henderson and Edward A. Reed for the following-described property, to wit:

44 The northeast quarter, the southeast quarter, the east half of the southwest quarter, and the southwest quarter of the southwest — of section nine (9), on township five (5) north of range two (2) west of the Salt Lake meridian, U. S. survey, be, and the same is hereby, declared to be null and void.

2. It is further ordered, adjudged, and decreed that the notes hereinafter described and the mortgage given to secure the payment of the same be, and they are hereby, declared null and void; that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, do have and recover from the plaintiffs in this action the three promissory notes of Reed and Henderson—one for $2,444.44, bearing date of March 26th, 1890, and becoming due on September 25th, 1890; also one for $2,444.45, bearing date of March 26th, 1890, and becoming due on the 26th day of March, 1891, and also one note for $391.10, bearing date of June 26th, 1891, and becoming due on demand—and that the said plaintiffs deliver to said defendants, Hiram H. Henderson and George H. Burgitt, said notes.

3. It is further ordered, adjudged, and decreed that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, do have and recover of and from the plaintiffs the amount of money heretofore paid on the purchase price of said land, amounting to $3,520.00, and interest at the rate of eight per cent. per annum, and costs of suit, taxed at $—.

JAMES A. MINER, *Judge.*

Done in open court this 21st day of July, 1894.

45 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and W. N. SHILLING, Plaintiffs,
vs.
E. A. REED and H. H. HENDERSON *et al.*, Defendants. } Stipulation.

It is hereby stipulated between the parties in the above-entitled action that all the allegations in the cross-complaint are hereby deemed denied without filing an answer thereto; and it is further stipulated and agreed that the allegations in the defendants' answer

and cross-complaint are sufficient to put in issue any defect or defects in plaintiffs' title to part or all the real estate described in plaintiffs' amended complaint that may now or have heretofore existed against the same, and all proper evidence may be introduced by either the plaintiffs or defendants either in support or in derrogation of said title notwithstanding the defects to said title may have not been specifically pleaded in the answer and cross-complaint.

BROWN AND HENDERSON,
Attorneys for Defendants.
JAMES N. KIMBALL AND
E. M. ALLISON, JR.,
Attorneys for Plaintiffs.

Dated June 6th, 1894.

46 In the Fourth Judicial District Court, Territory of Utah, County of Weber.

Fourth District Court, Utah.

Filed after settlement, August 4, 1894. K. S. Boreman, clerk, by L. B. Best, deputy.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson and George H. Burgitt, Guardian of the Person and Estate of Edward A. Reed, a Person Incapable of Conducting His Own Affairs, Defendants.

Statement of the case, to be used on motion for a new trial and on appeal, if an appeal is taken.

Appearances: Messrs. Kimball and Allison, attorneys for plaintiffs; Messrs. Brown and Henderson, Richards and Macmillan, H. H. Henderson, Esq., attorneys for defendants.

This cause having been heretofore, to wit, on the 23rd day of June, 1894, on motion of James N. Kimball, Esq., attorney for the plaintiffs, and by consent of H. H. Henderson, Esq., attorney for the defendants, referred to Jacob S. Boreman, Esq., as a special master in chancery, to try any and all issues, whether of law or fact, and conclusions of law, and a form of decree, and make due report
47 thereof to the court:

Now, on this the 2nd day of July, 1894, said cause came on for hearing before said special master in chancery; whereupon the following proceedings were had:

It was agreed between Mr. Henderson and Mr. Kimball that in this case that the case should proceed to trial before the referee, and that so soon as an administrator of the estate of Edward A. Reed was appointed he should be substituted as defendant in this action, and as of this date, in place of Edward A. Reed, who has died since the

commencement of this action, and that thereupon the action shall be dismissed as to George H. Burgitt, guardian of the estate and person of Edward A. Reed.

It is agreed by the parties to this action that the fees of the referee for the first day shall be $25.00 and for each additional day $15.00.

It is admitted that the land lies in section nine (9), township five (5) north of range two (2) west of the Salt Lake meridian, and is part of the land granted to the Union Pacific Railroad Company by the act of Congress of July 1st, 1862.

Mr. KIMBALL: I will offer in evidence the mortgage dated April 16th, 1867, and recorded November 23rd, 1871, in Book "A" of Mortgages of Weber County, at page 176, from the Union Pacific Railroad Company to Cyrus H. McCormick and John Duff, as trustees on all of the lands granted by act of Congress approved July 1st, 1862, and the act amendatory thereto, approved July 2nd, 1864. The trustees are authorized to release the lien created hereby upon any particular parcel of land upon payment of the purchase price thereof, and in case a vacancy shall happen in the board of trustees the remaining trustee shall, while said vacancy exists, have
48 all the rights, exercise all the powers, and discharge all the duties devolving on said trustee.

Then I offer in evidence an instrument called "an appointment," dated October 20th, 1873, recorded February 12, 1874, in Book I of Deeds, page 186, from John Duff to Frederick L. Ames, appointing Frederick L. Ames trustee in place of Cyrus H. McCormick, resigned.

I now offer in evidence a mortgage dated December 18th, 1873, recorded February 12th, 1874, in Book "A" of Mortgages, page 48, from the Union Pacific Railroad Company to the Union Trust Company of New York.

I now offer in evidence a warranty deed dated December 11th, 1883, recorded February 4th, 1885, in Book "R" of Deeds, page 601, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to William Van Dyke of the northwest quarter of the northeast quarter of section nine, township five (5) north of range two (2) west of the Salt Lake meridian.

I now offer in evidence a certificate dated September 28th, 1885, and recorded January 13th, 1886, in Book "T," page 225, from the Union Pacific Railroad Company, by its president and secretary, to whom it may concern, confirming and validating all of the deeds which had been signed by the vice-president of the company.

I now offer in evidence a warranty deed dated April 28th, 1887, recorded September 27th, 1887, in Book V, page 228, from the Union Pacific Railroad Company and Frederick L. Ames, remaining trustee, to John Selman, conveying the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian.

I now offer in evidence a warranty deed dated January 22nd, 1886, recorded January 22nd, 1886, in Book "S," page 614, from William Van Dyke to Louis B. Adams and Watson N. Shilling,

conveying the northwest quarter of the northeast quarter of section nine, township five north of range two west.

49 I now offer in evidence a warranty deed dated September 27th, 1887, recorded October 1st, 1887, in Book W, page 130, from John Selman to Louis B. Adams and Watson N. Shilling, conveying the northeast quarter of section nine, township five north of range two west.

I now offer in evidence a warranty deed dated October 18th, 1889, recorded July 5th, 1890, in Book 1, page 413, from the Union Pacific Railroad Company and the Union Trust Company to Adams and Shilling, conveying the south half of the northeast quarter, the east half of the southwest quarter, and the southeast quarter of section nine, township five north of range two west.

I now offer a warranty deed dated January 4th, 1888, and recorded May 1st, 1891, from the Union Pacific Railroad Company and Fred/erick L. Ames, trustee, to Louis B. Adams and Watson N. Shilling, conveying the southwest quarter of the southwest quarter of section nine, township five north of range two west.

I now offer in evidence an instrument, "appointment of trustee," dated July 2nd, 1889, recorded October 19th, 1889, in Book N, page 441, Frederick L. Ames to the Union *Pacific* Trust Company of New York.

Also an instrument entitled "conveyance," dated July 13th, 1889, recorded October 19th, 1889, from Frederick L. Ames to the Union Trust Company of New York.

Also an instrument dated July 15th, 1889, and recorded October 19, 1889, called "resignation," from Frederick L. Ames to who- it may concern.

Also an instrument called "conveyance and quitclaim," dated January 15th, 1890, and recorded June 19th, 1890, from Frederick L. Ames to the Union Trust Company of New York.

I offer in evidence a quitclaim deed, No. 128, from the Union Pacific Railroad Company to Louis B. Adams and Watson N. Shilling, dated November 2nd, 1891, remising and releasing

50 and forever quitclaiming to said Adams and Shilling all the title of the railroad company, all its interests and claim to any coal which may be hereafter found beneath the surface of the south half of the northeast quarter and the east half of the southwest quarter and the southwest quarter of section nine, in township five north of range two west of the Salt Lake meridian.

It is agreed that any and all of these conveyances may be copied and made a part of the record of this case by any party to this action, and it is also further agreed that the foregoing conveyances are introduced in evidence subject to all legal objections and exceptions that the parties defendant may take thereto in the argument of this case.

It is admitted by the parties defendant that on the 27th day of March, 1890, Louis B. Adams and his wife and Watson N. Shilling and his wife made a warranty deed to Edward A. Reed and Hiram H. Henderson for two-thirds of four hundred and forty acres of land, describing the same as lying in section nine, township six north

of range two west of the Salt Lake meridian, and that on the same day the defendants Reed and Henderson made and delivered to the plaintiffs a mortgage on the land last described.

JAMES N. KIMBALL, Esq., being duly sworn on behalf of the plaintiffs, testified as follows:

I state that on the 27th day of March, 1890, I prepared a deed from Louis B. Adams and his wife and Watson N. Shilling and his wife, above mentioned, as made to the defendants Reed and Henderson, for an undivided two-thirds of four hundred and forty acres of land, and that that deed is in my handwriting. At the time I drew the deed I had before me the deeds from Van Dyke and Selaman to Adams and Shilling, and also the deed from the Union Pacific Railroad Company to Adams and Shilling, except the
51 quitclaim deed made in November, 1890, by the railroad company to Adams and Shilling, and that in writing the description in the deed from Adams and Shilling and their wives to Reed and Henderson, I mistakenly wrote township six north of range two west instead of township five.

I further testify that on the 29th of September, 1891, I prepared the quitclaim deed, a copy of which is found at pages four and five of the amended complaint, from Louis B. Adams and Watson N. Shilling and their wives to Edward A. Reed and Hiram H. Henderson which conveys an undivided two-thirds of 440 acres of land situated in section nine, township five north of range two west.

REFEREE: How long was that after the original deed was made?

Mr. KIMBALL: That was pretty nearly a year.

Mr. HENDERSON: Pretty nearly a year and a half; the original deed was in March, 1890, and this was in September, 1891.

It is admitted by the parties to this action that the mortgage set out in the complaint as made by the defendants Reed and Henderson to the plaintiffs was, so far as the description is concerned, copied from the warranty deed set out in the amended complaint at pages two and three thereof.

Mr. KIMBALL: I offer in evidence the notes described in the mortgage from Reed and Henderson to Adams and Shilling of the date of March 27th, 1890.

Mr. HENDERSON: I will admit that the face of the notes, except the interest, as alleged in the cross-complaint, was not paid.

An adjournment was here taken until 1.30 p. m.

1.30 P. M., JULY 2ND, 1894.

Mr. KIMBALL: If the court please, I will offer in evidence a lease dated the 28th day of March, 1890, between Edward A. Reed and Hiram H. Henderson to Louis B. Adams and Watson N.
52 Shilling, leasing Adams and Shilling the east half of the south half of the southwest quarter and the northeast quarter of the southwest quarter of section nine, township five north of

range two west of the Salt Lake meridian, signed by Hiram H. Henderson and E. A. Reed, witnessed by George H. Burgitt.

Judge MACMILLAN: That will go in under the same objection.

Mr. L. B. ADAMS, being first duly sworn and examined in chief by Mr. Kimball, on behalf of the plaintiffs, testified as follows:

Q. Mr. Adams, you are one of the plaintiffs in this action?
A. I am.
Q. Do you remember the plaintiffs selling to Reed and Henderson some land about the 27th of March, 1890?
A. I do.
Q. Which one of the plaintiffs negotiated for that sale?
A. Mr. Reed.
Q. The plaintiffs, I mean?
A. I did.
Q. And with which one of the defendants?
A. With Mr. Reed.
Q. Whereabouts is the land you were selling or negotiating to sell located with reference to Ogden City?
A. It is about five miles and a half southwest of Ogden City, in the Kanesville school district.
Q. At that time state whether or not you showed the land to either of the defendants; and, if so, to which one?

Judge MACMILLAN: Mr. Reed is dead. We want an objection to any testimony as between Mr. Reed and him.

Mr. KIMBALL: I am not asking for any statements between him and Mr. Reed, but for what land, if any, he showed to the defendants or either of them.

A. I did not show the land to either of them, to my recollection.
53 Q. Did you have any talk with Mr. Henderson about where the land was located?
A. If I did I have no recollection of it.
Q. What other land, if any, did Adams and Shilling own in a body of 440 acres than this land you now mention?
A. None; excuse me—how is that?

(Question repeated.)

A. No other than that in a body.
Q. What township and range was that in?
A. I would have to refer to the deed, Mr. Kimball.
Q. Well, the deed is in township five, section nine—township five north of range two west.
A. Well, that is it, then.
Q. Do you reme-ber the fact that there was a mistake in the deed from yourself and Shilling to Reed and Henderson?
A. Yes; I learned that afterwards.
Q. How long afterwards—about how long, Mr. Adams?

A. I do not remember; it must have been all of a year. I think it was more than a year before I learned it.

Q. Do you remember the maturity of the second note they gave?

A. Yes; I remember when it matured.

Q. What time was it you first learned the mistake with reference to the maturity of that note?

A. I do not think I heard of it. I think it was subsequent to the maturity. It was so long ago I have paid no attention to the matter, and I am now testifying to my best recollection at this time.

Q. What land did you intend to sell or convey to Reed and Henderson at the time you made the deed in March, 1890?

A. A tract of land owned by Adams and Shilling, under fence in Kanesville school district, amounting to 440 acres, more or less.

Q. Two-thirds of that tract?

A. Two-thirds of that tract.

Q. That is the same tract of land they leased to you subsequently?

A. It is.

54 Cross-examination by Judge MACMILLAN:

Q. This land, you say you owned it—you bought from the Union Pacific?

A. We bought the bulk of it from the Union Pacific; I think all but eighty acres.

Q. Who did you buy that from?

A. We bought forty acres from a man by the name of Neilson and forty acres from a man by the name of Selman.

Q. It is all in the same section?

A. The same section; these two forties that we bought outside of the Union Pacific were joining.

Q. Included land granted to the Union Pacific by the United States Government?

A. I presume so; I think I also bought one forty from George N. Ritter, but I am not sure whether I have his deed; I think it was a contract that he turned over, a U. P. contract.

Q. This lease was made the same — that the deed was made?

Mr. KIMBALL: The next day after.

Judge MACMILLAN: You never showed the land to either one of these parties?

A. No, sir; Mr. Reed went down several times.

Q. You do not know that from your own knowledge?

A. No; only what he told me.

Judge MACMILLAN: We ask that what he told Mr. Adams be stricken out.

Q. It is the land, is it, where your nursery is now?

A. No, sir.

Mr. KIMBALL: I submit, if your honor please, that we are entitled to what Mr. Reed told him.

Judge MACMILLAN: I withdraw the objection made to the admission of testimony as to what Mr. Reed said.

Plaintiffs rest.

55 *Defendants' Case.*

H. H. HENDERSON, being duly sworn, and examined by Judge Macmillan, testifies as follows:

Q. Mr. Henderson, will you relate this transaction as you remember it?

A. It is my recollection of purchasing this property along about a day or two before this deed was given, which bears date, I believe, of March 27th, 1890. I went into the bank and saw Mr. Adams, and I asked him if he had some land lying west of the town here, a tract of land four or five hundred acres. He said he did. I asked him how much he asked for it. Well, he says at that time that he could not give any definite answer how much he did ask for it, for the reason that Mr. Shilling was interested with him. It is my recollection that that was in the forenoon, and he made an engagement with Mr. Shilling for that evening about seven or half past seven, and I met Mr. Adams and Mr. Reed and Mr. Shilling over in the Utah National bank. I stood right out there in front of Mr. Adams' desk. We did not go in behind the bars. We talked the property over, and Mr. Adams did the talking and said they asked twenty-five dollars an acre for it. We asked them if they had an abstract. Mr. Adams said they did not have any at present. I asked him if he had a good title to the property, and he said that they had, and we talked along there for a few minutes, and they said they would get an abstract for us all right, and we concluded that we would purchase it. First we wanted the whole property. They concluded they would not sell but two-thirds interest; they wanted to retain an interest in the land, and the fact was that the bargain was concluded that evening. It was
55½ along about seven or seven thirty. It was just after dark, and the next morning the deed was made out and the mortgage was made out, and we signed it and gave the notes. I never saw the property and never saw it to this date. I relied on what Mr. Adams said. I understood it was land lying down there three or four miles west or southwest, as Mr. Adams says. It lay over in this direction (pointing), and I never ascertained anything about the title until a year after that, when the abstract was made, in September, 1891, and at that time in looking over the abstract I found this mistake—that he did not own the property in township six, as the deed and the mortgage called for, but he did own property in township five; but the abstract was made out for township five. When we looked over the abstract I did not think the title was perfect or he had a good title, and I told Mr. Adams at that time that he did not have a good title.

Q. Which time?

A. Well, it was just after this abstract was made. It was along in the latter part of September, 1891. I told him then that I did not think he could give a good title to it, even at that time, and I told him that we would rescind the sale, and a day or so after that

Mr. Kimball came over with this quitclaim deed that he has here, tendering me the quitclaim deed with $1.50, as he states.

Mr. KIMBALL: It is not a quitclaim purely; it is a special warranty.

WITNESS: Well, that is what it is called on the outside. I refused to accept it, and served a notice on Mr. Adams and Shilling rescinding the sale and demanding back the purchase price, with interest. We had paid at that time $2,444.44, I believe, one-third of the purchase price, and afterwards we paid the interest to September 26th, I believe, of 1890, and we had also given a note for interest from September 26th, 1890, or whatever date that note bears.

56 Mr. KIMBALL: That is the one we produced and offered to cancel or surrender.

Judge MACMILLAN: Now, Mr. Henderson, would you have bought that land if you knew that the title was as it was at that time?

Mr. KIMBALL: I submit that is hardly proper.

(Objection overruled and exception taken by plaintiffs. J. S. B.)

WITNESS: I would not have bought the land they offered me under the quitclaim deed if I had known that it was in the condition that it was, even in township six.

Q. When did you first discover this mistake?

A. Did not discover it until September, 1891.

Q. What led you to discover it?

A. We had some men here from Denver at that time who were thinking of purchasing property—in fact, they made us an offer on the property if the title was all right. This abstract was gotten out by us for them.

Q. Did Mr. Adams or Mr. Shilling ever give you any abstract?

A. No; they never did.

Q. When you got this abstract out to sell the land to these people from Denver you found that there was objections to the title?

A. Yes; they would not take it.

Q. Does the record show these faults in the title?

A. Yes, sir.

Q. Now, since that *that*, has it been further incumbered; and, if so, by what?

A. Well, all I know about it is what the abstract shows. I will read the incumbrances that have been put upon it since that time

(Reads from abstract.)

At the time Adams and Shilling gave us this deed and at the time they also tendered us the quitclaim deed in September, 1891, Byron H. Douglass and Celestia Douglass had a judgment against Louis B. Adams and Watson N. Shilling, which is recorded

57 in Judgment Record "A," page 445, in the district clerk's office of this district, and since that time Louis B. Adams and William F. Adams, Louisa M. Adams, Edward M. Allison, Jr., and Sarah V. Walker had given a quitclaim of all their right, title, and interest to George B. Barstow of all their property.

Mr. KIMBALL: Since what time?

WITNESS: Since you offered me the deed of September 29th, 1891. That quitclaim deed bears date of August 31st, 1893, and was filed September, 1893, in Book 19, page 447, of county records of Weber county.

Mr. KIMBALL: I submit that this is immaterial and incompetent; it only purports to be all their right, title, and interest and they had none long subsequent to the tender to them of the special warranty deed.

(Objection is sustained. J. S. B.)

REFEREE: I do not think that would effect the title any.

Judge MACMILLAN: We would like to get it in, because in the argument we will contend, in the first place, what they did deed to us was a misdescription, and that the deed they afterwards gave us was simply a quitclaim deed, with a special warranty in it, to another piece of ground—the piece they intended to give us—so we would like to get it in subject to your ruling, on the argument of the case, as to whether it ought to go in.

(Objection sustained. J. S. B.)

REFEREE: It can go in with that understanding.

Mr. HENDERSON: Then the next is a county tax deed from J. P. Ledwidge, county clerk, to Louis B. Adams and Watson N. Shilling, dated Jan'y 18t-, 1894, and filed Jan'y 18th, 1894, in Tax Book 1, page 121.

Mr. KIMBALL: I will make the same objectio- to that, that it is immaterial and incompetent, long subsequent to the transaction and long subsequent to the tender of this special warranty deed.

58 Judge MACMILLAN: We want it to go in the same way until the argument.

(Objection sustained. J. S. B.)

REFEREE: It may go in that way.

Mr. KIMBALL: I except to this ruling.

Mr. HENDERSON: The next is G. R. Belnap, sheriff of Weber county, by Oliver Belnap, deputy sheriff, to whom it may concern; attachment filed March 28th, 1894; recites that he attached an undivided one-sixth interest in the lands described.

Mr. KIMBALL: I object to that because that attachment only purports to be on Shilling's interest, one-sixth.

Mr. HENDERSON: Well, we will skip that and take the next one, filed March 26th, 1894. This is by Nat. M. Brigham, United States marshal, by E. W. Exum, deputy United States marshal, to whom it may concern; attachment filed March 26th, 1894; attaches the southwest quarter of the southeast quarter and the northeast quarter of section nine, township five north of range two west of the Salt Lake meridian, and other lands.

Mr. KIMBALL: I object to that as immaterial and incompetent.

REFEREE: I do not think it is proper.

(Objection sustained. J. S. B.)

It is agreed that all instruments offered in evidence by either party may be admitted in evidence subject to all legal objections and exceptions on the part of the defendants so far as plaintiffs' instruments are concerned, and subject to specific objections made by plaintiffs to defendants' instruments in writing, the court to make its ruling after the argument and note the exceptions of each party at that time against whom his ruling is made.

59 Judge MACMILLAN (to witness): Mr. Henderson, have you seen this land?

A. I have not.

It is here understood and agreed between the parties that the part in writing, signed L. B. Adams, on the lease (heretofore offered in evidence) and surrounded by a pencil line is not included in plaintiffs' offer of the lease in evidence.

Q. When you informed these people that you rescinded this contract did you give them any reason for it?

A. I told them——

Q. That was in writing?

Mr. KIMBALL: The writing would be the best evidence.

Judge MACMILLAN: I had forgotten that. Where is the writing?

A. I served copies on Mr. Adams and Mr. Shilling. The original, I believe, I made duplicates. Before I served this notice in writing I had told him verbally that we rescinded the sale.

That was before Mr. Kimball tendered me the quitclaim deed; then, after the quitclaim deed was tendered, I served notice upon them demanding back this money and the cancellation of the note, with the interest on the money we had already paid.

Mr. KIMBALL: I object to that as immaterial and incompetent and as not the best evidence, as he says that notice was in writing.

(Objection sustained. J. S. B.)

Judge MACMILLAN: Do you know where that notice is, Mr. Hend-rson?

A. I have got it here in the papers somewhere.

(Witness produces paper and hands same to examining counsel.)

Q. This is a copy of the notice you served on the plaintiffs?

A. Yes, sir.

We offer it in evidence.

60 Mr. KIMBALL: I make the same objection, that it is immaterial and incompetent, being subsequent to the date of the tender of the special warranty or quitclaim deed.

(Objection is over-uled and exception taken by plaintiffs. J. S. B.)

REFEREE: It may go in subject*ion* to the objection.

Judge MACMILLAN: Mr. Henderson, did you notify them before that?

Mr. KIMBALL: That is already testified to, that he gave them oral notice.

WITNESS: I gave them oral notice, as I said, and demanded back the money.

Q. I see this abstract, the first part of it, is dated the 3rd day of September; can you place the date of that oral notice in relation to the date of this?

A. It was the day or next day after I received the abstract. It was after I had a chance to look it over and pass on it. I wish to have it go on the record that the abstract is of the date of September 3rd, 1891.

K. S. BOREMAN, being first duly sworn and examined on behalf of the defendants, testified as follows:

Q. Mr. Boreman, what position do you hold?

A. Clerk.

Mr. KIMBALL: I will admit that he is clerk of the fourth district court and custodian of the records of that court.

Q. Mr Boreman, have you examined the judgment docket of your court?

A. Yes, sir.

Q. On these judgment dockets have you found any judgments against W. N. Shilling or L. B. Adams?

A. I find some against Shilling and Adams; yes, sir.

Q. Will you turn to your record and state the date and the amount?

A. In Judgment Docket "A," on page 66, appears a judgment on verdict for the possession of certain lands, docketed June 4th, 1887.

61 Q. Who is judgment creditor?

A. Central Pacific Railroad Company is judgment creditor. Docket B, page 66; Judgment Record A, page 288, dated June 24th, 1887.

Q. Does that carry a money judgment?

A. I have not looked at it.

Mr. KIMBALL: There is none docketed?

A. None docketed.

Mr. KIMBALL: I object to this offer as immaterial and incompetent.

Mr. HENDERSON: That is all right; we do not insist upon it; it does not show a money judgment.

(Objection sustained.)

Q. What is the next one?

A. On page 124, Docket A: Judgment against L. B. Adams and W. N. Shilling in favor of Byron H. Douglass to quiet title and for $64.30 costs, dated April 18th, 1889. Judgment Record A, page 445. It appears satisfied April 18th. A. R. Heywood, attorney for Byron and Celestia Douglass.

Q. When was it satisfied, according to the date?
A. September 7th, 1891.
Q. When was this record satisfied?
A. I have no recollection; do not know anything about it except it shows on the face of the record September 27th, 1889.
Q. What next do you find?
A. In Judgment Docket B, page 222: Judgment in favor of Fred. J. Kisel against W. N. Shilling for $8,000, interest at 10 %, costs taxed at $64.45; docketed May 11th, 1894. Judgment Record E, page 639, the following entries appear on the margin——

Mr. KIMBALL: I object to this judgment as immaterial and incompetent. They were only taken a few weeks ago and they are against W. N. Shilling.

(Objection sustained. J. S. B.)

REFEREE: They can go in subject to the objections.
WITNESS: The following entries appear on the margin: May 11th, 1894, there is paid on this judgment $7,994.80. A. R. Heywood, attorney for plaintiff.
62 Q. What is the next one?
A. Further on that execution on return showing this judgment to be fully satisfied—K. S. Boreman, clerk; June 24th, 1894. Another entry is: Judgment against W. N. Shilling in favor of D. H. Perry, Jr., by default for $1,024.68, interest at 10 %, and costs taxed at $53.75.

Mr. KIMBALL: I make the same objection to that judgment, as being immaterial and incompetent.

(Objection is sustained. J. S. B.)

WITNESS: Judgment is docketed May 11th, 1894, Judgment Book E, page 639.

Q. What page is it in the Judgment Docket?
A. On page 222 of Docket B the following entry appears on the margin: May 11th, 1894, there is paid on this judgment $2,880. A. R. Heywood, attorney for plaintiff.
Q. What is the next judgment?
A. The next judgment appears on Judgment Docket B, page 234, against W. N. Shilling for $6,854.12, with interest at 10 % and costs taxed at $61.40. Docketed June 11th, 1894, Judgment Record E, page —. I have not got the page down.

Mr. KIMBALL: I object to that as immaterial and incompetent for the reason that it is long subsequent to the execution of the mortgage sought to be foreclosed, and, second, because it is a lien only on the interest of W. N. Shilling, being only an undivided one-sixth, as shown by the attachment papers themselves.

Q. Has this judgment ever been satisfied?
A. Not so far as it appears on the record.

Mr. KIMBALL: As a matter of fact, it does not.

(Objection sustained. J. S. B.)

Judge MACMILLAN (to H. H. Henderson): What was the reason that you refused the deed?

A. The first reason was that they did not have a good title to
63 the property, and the second was that it was not a full warranty deed.

Q. That is the second deed?

A. No, sir; that one which bears date of September 29th, 1891.

Q. Did you inform them?

A. I told Mr. Kimball so.

It is admitted that the lands in controversy are and have been heretofore used and cultivated as agricultural lands, and lay in a valley at the base of the Wasatch mountains, and that no exploration or examination has ever been made on said land for coal and minerals of any kind or description, and that there is not patent of record in Weber county, being the county in which the lands in controversy are situated, for the east half of the southwest quarter of section nine, township five north of range two west of the Salt Lake meridian, and being the land in controversy, and the conveyances and instruments introduced in evidence in this action by the plaintiffs are the chain of title upon which plaintiffs base their title to the lands in controversy and are the only chain of title of record in the county of Weber.

Mr. KIMBALL: I now offer in evidence, in behalf of the plaintiffs, a patent by the United States of America to the Union Pacific Railroad Company, dated February 24th, 1887, and recorded in the office of the county recorder, in Book 1, page 181, for the northwest quarter of section nine, township five north of range two west of the Salt Lake meridian. I offer it as tending to show t-at the United States had passed upon the character of the land in controversy, that being a part of the same section.

Judge MACMILLAN: We offer all of the objections that we did before—that it is immaterial, irrelevant, and incompetent, and it being other lands that that in controversy.

REFEREE: It goes in subject to the same objection.

Defendants rest.

64 Mr. KIMBALL: I offer in evidence notice of the pendency of this action, filed January 8th, 1892, in the recorder's office of Weber ——, Utah, setting forth the object of the action and describing the lands affected by it.

The above are all the proceedings and all the evidence had in said cause.

The defendants waived all objections to the introduction of the documentary evidence.

65 In the District Court, Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS and WATSON N. SHILLING, Plaintiffs,
vs.
EDWARD A. REED and MILLIE G. REED, His Wife; HIRAM H. Henderson, George H. Burgitt, Guardian of the Estate and Person of Edward A. Reed, a Person Incapable of Conducting His Own Affairs.

It is hereby stipulated and agreed by and between the parties to this action that the plaintiffs can use on their motion for a new trial in this action, the same as though incorporated into the statement of the case, the following documentary evidence, introduced by them in evidence on trial in this action before the referee, to wit:

1. A mortgage dated April 16th, 1867, and recorded Nov. 23rd, 1871, in Book "A" of Mortgages of Weber County, Utah, page 176, from the Union Pacific Railway Company to Cyrus H. McCormick and John Duff, as trustees.

2. An instrument called an appointment, dated October 20th, 1873, and recorded February 12th, 1874, in the office of the county recorder of Weber county, Utah, in Book "I" of Deeds, page 176, from John Duff to Frederick L. Ames.

3. A mortgage dated December 18th, 1873, and recorded in the office of the county recorder of Weber county, Utah, February 12th, 1874, in Book "A" of Mortgages, at page 48, from the Union Pacific R. R. Company to the Union Trust Company of New York.

66 4. A warranty deed dated December 11th, 1883, and recorded February 4th, 1885, in the said county recorder's office, in Book "R" of Deeds, at page 601, from the Union Pacific R. R. Company and Frederick L. Ames to William Van Dyke.

5. An instrument called a certificate, dated September 28th, 1885, and recorded in the office of said county recorder January 30th, 1886, Book T, page 225, from the Union Pacific R. R. Company to whom it may concern.

6. A warranty deed dated April 28th, 1887, and recorded Sept. 27th, 1887, in the office of said county recorder, in Book "V" of Deeds, page 228, from the Union Pacific R. R. Company and Frederick L. Ames to John Selman.

7. A warranty deed dated January 22nd, 1886, and recorded in the office of said county recorder January 22nd, 1886, in Book "S" of Deeds, page 614, from William Van Dyke to Louis B. Adams and Watson N. Shilling.

8. A warranty deed dated September 27th, 1887, and recorded in the office of said county recorder October 1st, 1887, in Book "W" of Deeds, page 130, from John Selman to Louis B. Adams and Watson N. Shilling.

9. A warranty deed dated October 18th, 1889, and recorded in the office of said county recorder July 5th, 1890, in Book One of Deeds, at page 413, from the Union Pacific R. R. Company and the Union Trust Company of New York to Adams and Shilling.

10. A warranty deed dated January 4th, 1888, and recorded in the office of said county recorder May 1st, 1891, from the Union Pacific R. R. Company and Frederick L. Ames, trustee, to Louis B. Adams and Watson N. Shilling.

67 11th. An instrument called an appointment of trustee, dated July 2nd, 1889, and recorded in the office of said county recorder Oct. 19th, 1889, in Book *of* "N" of Mortgages, page 441, from Frederick L. Ames to the Union Trust Company of New York.

12. An instrument called a conveyance, dated July 13th, 1889, and recorded in the office of said county recorder October 19th, 1889, from Frederick L. Ames to the Union Trust Company of New York.

13. An instrument called a resignation, dated July 15, 1889, and recorded October 19th, 1889, from Frederick L. Ames to whom it may concern.

14. An instrument called a conveyance and quitclaim, dated Jan. 15th, 1890, and recorded June 19th, 1890, from Frederick L. Ames to Union Trust Company of New York.

15. A quitclaim deed, No. 128, dated November 2nd, 1891, from the Union Pacific R. R. Company to Louis B. Adams and Watson N. Shilling.

And it is further stipulated and agreed that in the event either of the parties to this action appeal this case to the supreme court of the Territory, that the instruments designated above shall be copied at large and attached to the statement of the case in this action, and shall thereupon become a part thereof the same as though the same were copied into the same at this time.

Ogden, Utah, August 2nd, 1894.

JAMES N. KIMBALL,
Attorney for Plaintiffs.
RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants.

68 *Specification of Particulars in which the Evidence is Insufficient to Sustain the Findings and Decision of the Court and of the Master in Chancery.*

1. The evidence is insufficient to justify that part of the third finding of fact in the words and figures following, to wit:

"That the representations made by Adams and Shilling, as aforesaid, to said Reed and Henderson were untrue," in this: that the evidence did not and does not show that Adams and Shilling did not have a good and indefeasible estate in fee-simple to the land described in finding of fact number two.

2. The evidence is insufficient to justify the second finding of fact, in this: that the evidence did not and does not show that the defendants Reed and Henderson, or either of them, rescinded the contract of sale between themselves and plaintiffs.

Specifications of Particulars in which the Conclusions of Law and Decision of the Court and Master in Chancery are against Law.

1. Conclusion of law number two is against law and contrary to the findings of fact, in this: that the evidence does not show that the plaintiffs did not or do not now have a good title in fee-simple to the lands described in conclusion of law number one, or that the notes mentioned in said conclusion of law number two are without consideration.

II. The third conclusion of law is against law, in this: that the findings of fact do not show that the representations by plaintiffs to Reed and Henderson concerning the title to the land intended to be conveyed by them were untrue.

III. The fourth conclusion of law is against law, in this: that the findings of fact do not show that the title of the Union Pacific Railway Company to the lands described in finding of fact number two was not good, or that it was incumbered, or that it may be defeated at any time by the United States.

69

IV. The fifth conclusion of law is against law, in this: that the findings of fact do not show that Hiram H. Henderson and George H. Burgitt, guardian of E. A. Reed, or either of them, are entitled to recover of plaintiffs the promissory notes or money mentioned in said conclusion of law.

V. That the last two conclusions of law are against law, in this: that the findings of fact do not show and the evidence does not show that the quitclaim deed of November, 1891, did not release the right of the Union Pacific Railway Company to enter upon the land *and* intended to be conveyed to explore for minerals other than coal, and the findings of fact or the evidence did not show that the United States retained the right to explore or authorize the exploration of the lands intended to be conveyed for minerals other than coal.

Specifications of Errors of Law Occurring at the Trial and Excepted to by the Plaintiffs.

I. The master in chancery erred in his second conclusion of law, in this: that neither the findings of fact nor the evidence shows that the plaintiffs did not, do not now, and never did have a good title in fee-simple to the lands described in conclusion of law number one, or that the several notes given by the defendants to the plaintiffs mentioned in conclusion of law number two or that either of them were given without consideration.

II. The master in chancery erred in making the third conclusion of law, in this: that neither the findings of fact nor the evidence show that the representations made by the plaintiffs concerning the title to lands described in conclusion of law number one were untrue or a fraud in law upon the defendants or either of them.

70

III. The master in chancery erred in his fourth conclusion of law, in this: that neither the findings of fact nor the evidence showed or show that the title of the Union Pacific Rail-

way Company to the land in controversy (being the land described in conclusion of law number one) is not or was not a good title, or that it was incumbered, or that it could or might be defeated at any time by the United States before the issuance of patent.

IV. The master in chancery erred in his fifth conclusion of law, in this: that neither the findings of fact nor the evidence shows that the defendants Hiram H. Henderson, George H. Burgitt, as guardian of the estate of Edward A. Reed, or either of them are entitled to recover from the plaintiffs in this action the promissory notes or money mentioned in conclusion of law number five.

V. The master in chancery erred in the last two conclusions of law, in this: that the quitclaim deed mentioned in the next to the last conclusion of law does not show that the Union Pacific Railway Company did not release its right to enter upon the land in said conclusion of law described and explore the same for minerals other than coal.

That neither the findings of fact nor the evidence shows that the United States held or retained the right to explore or authorize the exploration of said land for minerals other than coal.

JAMES N. KIMBALL,
Attorneys for Plaintiffs and Appellants.

To said defendants and to Messers. Richards and Macmillan and H. H. Henderson, attorneys for defendants:

You will please take notice that the plaintiffs in the above-entitled action have prepared and do hereby serve on you the foregoing as their statement of the case in said action, to be used on their motion for a new trial on appeal, in event an appeal is taken by
71 either party in said action.

August, 1894.

JAMES N. KIMBALL,
Attorney for Plaintiffs.

I, the master in chancery who tried the above-entitled action, do hereby certify that the foregoing statement is correct, and the same is hereby allowed.

Dated August 4th, 1894.

JACOB S. BOREMAN,
Master in Chancery.

Served on us this 4th day of August, 1894.

RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants.

We, the attorneys in the above-entitled cause, hereby agree that the foregoing is correct.

Ogden, August 4th, 1894.

JAMES N. KIMBALL,
Att'y for Plaintiffs.

RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants.

72 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

LOUIS B. ADAMS *et al.*, Plaintiffs,
vs.
EDWARD A. REED *et al.*, Defendants. } Notice of Appeal.

To Messrs. Richards and Macmillan and H. H. Henderson, Esq., attorneys for defendants.

GENTLEMEN: You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of Utah Territory from the judgment made and entered in said district court on the 21st day of July, 1894, in favor of the defendants in said action and against the plaintiffs, and from the whole thereof.

You will also take notice that the plaintiffs hereby appeal to the supreme court from the order of said district court made and entered on the 10th day of August, 1894, overruling and denying the motion of plaintiffs for a new trial in said action, and from the whole thereof.

JAMES N. KIMBALL,
Attorney for Plaintiffs.

Ogden, Utah, August 28th, 1894.

Due service of this notice is hereby acknowledged.
August 24th, 1894.

H. H. HENDERSON AND
RICHARDS AND MACMILLAN,
Attorneys for Defendants.

73 In the District Court of the Fourth Judicial District, Territory of Utah, County of Weber.

L. B. ADAMS *et al.*, Plaintiffs,
vs.
E. A. REED *et al.*, Defendants. } Order Overruling Motion for a New Trial.

This cause having been on the 8th inst., submitted to the court on plaintiffs' motion for a new trial, now comes the court and, being fully advised in the premises, orders that the said motion be, and the same is hereby, overruled and denied.

H. W. SMITH, *Judge.*

Done in open court this 9th day of August, A. D. 1894.

TERRITORY OF UTAH,
County of Weber, } *ss:*

We, the attorneys for the respective parties in the above-entitled action, do hereby certify that the foregoing transcript is correct, and that the copies of the judgment-roll, order overruling motion for a new trial, statement of the case, judgment and decree, and

notice of appeal, contained in said transcript, are full, true,
74 and correct copies as they appear on the files of the fourth district court of said instruments; and we further certify that an undertaking on appeal in due form has been properly filed by the plaintiffs and appellants.

Witness our hands this 18th day of September, 1894.

JAMES N. KIMBALL,
Attorney for Plaintiffs and Appellants.
RICHARDS AND MACMILLAN AND
H. H. HENDERSON,
Attorneys for Defendants and Respondents.

75 In the Supreme Court of Utah Territory, Regular January Term.

MONDAY, *January 28th*, 1895.

LOUIS B. ADAMS *et al.*, Appellants,
vs.
EDWARD A. REED *et al.*

This cause, coming on regularly for hearing, was argued by Mr. John A. Marshall and Mr. James N. Kimball for the appellants, and by Mr. J. H. Macmillan and Mr. H. H. Henderson in reply, was submitted and taken under advisement.

76 In the Supreme Court of Utah Territory, Regular June Term.

MONDAY, *June 3rd*, 1895.

LOUIS B. ADAMS *et al.*, Appellants,
vs.
EDWARD A. REED *et al.*

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

Thereupon counsel for the appellants prays the allowance of an appeal to the Supreme Court of the United States and ask- that the amount of a bond to be given thereon be now fixed; and it was ordered that such appeal as prayed for be, and the same is hereby, allowed, and the amount of the bond to be given thereon is now fixed in the sum of three hundred dollars.

77 *In the Supreme Court of Utah Territory.*

LOUIS B. ADAMS and WATSON N. SHILLING, Plaintiff- and Appellants,
vs.
EDWARD A. REED, H. H. HENDERSON, *et al.*, Defendants and Respondents.

KING, *J.:*

The plaintiffs allege in their complaint that in March, 1890, they were the owners and entitled to the possession of certain land in Weber county; that on the 27th of said month they sold said estate to defendants and executed a warranty deed, but by mistake said property was described as being in township six instead of five; that on the 29th of September, 1891, as soon as said mistake was discovered, they made a quitclaim deed to defendants, correctly describing the land intended to be conveyed, which they tendered to defendants and now bring into court; that in part payment for said land defendants executed two promissory notes, which were secured by a mortgage on the land, but which mortgage contained the same error in description as said deed. Plaintiffs pray for the reformation of the mortgage and for its foreclosure.

Defendants answered and filed a cross-complaint, in which they averred that, relying upon the representations of plaintiffs that they owned and had a good title in fee-simple to 440 acres of land lying near Ogden City, and without investigating the title or seeing the land, they purchased an undivided two-thirds interest and
78 executed the mortgage described in plaintiffs' complaint in part payment of the purchase price; that subsequently they ascertained that plaintiffs were not the owners of and did not have an indefeasible and fee-simple title to said land or any title to the land conveyed; that thereupon they demanded back the amount paid to plaintiffs and the surrender and cancellation of the notes given in part payment; that said representations as to title were false and fraudulent, which plaintiffs then and there knew, and were made to defraud defendants. There are further allegations in the cross-complaint with respect to the character of plaintiffs' title and the fraudulent representations. Defendants pray that the mortgage and notes be cancelled and delivered up.

The principal questions for our determination are:

1. Did the Union Pacific Railroad Company have a fee-simple title to the land in township five which plaintiffs attempted to convey to defendants?

2. If so, was this title conveyed to defendants?

3. If the above questions are determined negatively, then was there such fraud upon the part of plaintiffs as to be the foundation for the re-cission of the contract between plaintiffs and defendants?

4. Do the facts of the case show a re-cission?

1. By the act of Congress passed July 1, 1862, certain lands were granted to the Union Pacific Railroad Company for the purpose of aiding in the construction of a transcontinental railroad. The lan-

guage of the grant is: "There be, and is hereby, granted to the said company * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of the railroad on the line thereof and within the limits of ten miles on each side of said road, not sold,
79 reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim would have attached at the time the line of said road is definitely fixed: Provided that all mineral lands shall be excepted from the operations of this act."

It is admitted that the land in controversy in this suit is within this grant, and that no patent has ever been issued therefor. The court below, adopting the findings of the referee, found that the land has been and is still used for agricultural purposes; also that no exploration or examination has been made for coal or minerals of any kind.

Appellants' contention is that the act of Congress above referred to was a grant *in præsenti* and passed the present legal title, at least as soon as the road was constructed and the identification of the sections became possible, to all of the lands embraced within it, except those to which a pre-emption or homestead claim attached and which were not known to contain mineral.

Respondents' claim is that, no exploration or examination having been made by the Government to ascertain whether the lands were mineral or non-mineral and no patent having been issued, an imperfect and defeasible title passed by the grant to the railroad company.

Our attention is invited to numerous cases decided by the Supreme Court of the United States and other courts wherein this and similar grants to railroad companies are construed. The language of these decisions seems to the writer of this opinion clear and unambiguous. By many it is declared that by their terms these grants import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described, and while the grant is in the nature of a "float," when the route of the road is definitely fixed the lands granted become susceptible of identification and the title attaches as of the date of the grant and has the same effect upon the
80 selected parcels as if they had been specifically described in the acts of Congress.

To me it seems there is much force in this contention of appellants. The Union Pacific railroad has been completed for more than a quarter of a century. The Government has not explored the lands to ascertain whether they contained minerals. There is nothing to evidence a purpose upon its part to make such exploration. The railroad was entitled to a patent as soon as the commissioners appointed by the President of the United States reported the completion and equipment of the road. The Supreme Court of the United States has declared in effect that patents are unnecessary to divest the United States of its title and invest the grantees therewith. Patents * * * "identify the lands as coterminous with the completed section, but they would be evidence

that as to that portion of the road the conditions of the grant had been complied with. * * * As deeds of further assurance, they would thus be of great value in giving quiet and peace to the grantee's possession."

St. Paul & Pacific R. R. Co. *vs.* Northern Pacific R. R. Co., 139 U. S., 1.

The decisions cited by appellants seem to have regarded the mineral reservations in these grants as reaching only such lands as were known to contain minerals at the time of the grant.

But it would be profitless to enter into a discussion of this phase of the subject and analyze the authorities collated, for the reason that they are ably considered and exhaustively treated by Mr. Justice Brewer in his dissenting opinion in the case of Barden *vs.* Northern Pacific Railway Company, 154 U. S., 332.

The writer of this opinion acknowledges the almost unanswerable arguments adduced by the learned justice, but recognizes that this court is bound by the majority opinion in that case. But it
81 must be confessed that this opinion cannot easily be reconciled with very many utterances of that high tribunal.

Appellants' counsel insist that the case last cited is not decisive of the point now under consideration. Counsel for respondent- contend with equal vehemence that under this decision until patent issues no indefeasible title to the lands within the grant passes to the grantees.

An examination of the grant to the Northern Pacific Railroad Company shows that the words there employed are almost identical with those found in the grant to the Union Pacific. The words in the former are: "To every alternate section of public land not mineral," and the following proviso is attached to the granting section of the act: "Provided that all mineral lands be, and the same are hereby, excluded from the operations of this act," etc.

Applying the doctrine enunciated in the Barden case, it would seem that at any time before exploration for minerals and the issuance of patent the Government can, upon the discovery of minerals within the land granted, not only refuse patent for such lands as contain mineral, but dispose of them to others than the grantee or its vendees, and that such grantee or vendees would not possess an indefeasible title to all the lands embraced within the grant. In the Barden case, just cited, the court held that the words quoted were an exclusive reservation of all minerals to the United States, and that it was immaterial whether there was knowledge of the existence of mineral deposits, if discovered at any time before patent passed from the Government.

Some of the cases upon which appellants rely are considered and explained. Speaking of the St. Paul & Pacific R. R. Co. *vs.* Northern Pacific R. R. Co., 139 U. S., and Deseret Salt Co. *vs.* Tarpey,
82 142 U. S., 241, the court say: "In both of these cases the writer of this opinion had the honor to write the opinion of this court, and it was never asserted or pretended that they decided anything respecting the minerals, but only that the title to the lands

granted took effect, within certain designated exceptions, as — the date of the grant. They never decided anything else. And what was that title? It was of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached. * * * It seems to us as plain as the language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. * * * Mineral lands were not conveyed, but by the grant of Congress itself and the subsequent resolution of Congress cited they were specifically reserved to the United States and excepted from the operations of the grant. Therefore they were not to be located at all, and if in fact located they could not pass under the grant. * * * When the act was passed it would have been impossible to state with any accuracy what parts of the tract contained minerals and what did not. That fact could only be ascertained after extensive and careful explorations. * * * The determination of the character of the land granted by Congress in any case, whether agricultural or mineral, is placed in the hands of the officers of the Land Department, whose action is subject to the revision of the Commissioners of the General Land Office, and an appeal lies from them to the Secretary of the Interior. Under their direction and supervision, the actual character of the land may be determined and fully established."

83 The court then quotes from the opinion of Mr. Noble, late Secretary of the Interior, in the case of the Central Pacific R. R. Co. *vs.* Valentine, 11 Land Dec., 238. The language is as follows: "Moreover, I am informed by the officers in charge of the mineral division of the Land Deaprtment that ever since the year 1867 * * * * it has been the uniform practice to allow and maintain mineral locations within geographical limits of railroad grants based upon discoveries made at any time before patent or certification where patent is not required."

It seems very clear from these decisions that, while the grant to the Union Pacific Company was one *in præsenti* and as to the lands embraced within its limits which were not within the exceptions or reservations, the title took effect upon identification as of the date of the grant; but as to lands containing minerals, whether known or unknown, no title passed, and the failure of the Government to explore or issue patents and the great lapse of time have not ripened a defective title into an indefeasible one. This being true, until patent issues there would be uncertainty as to the character of one's title. The land might be used exclusively for agricultural purposes; the grantee and its vendees might regard it as utterly devoid of mineral; men of science might unanimously agree that it was barren of mineral wealth, still it is possible mysterious nature may have impregnated the soil with its richest wealth.

While the patent does not change the character of the land, it is more than an assurance of title; it is conclusive evidence, when no fraud exists, that the Government regards the land as freed from

the reservation, and it is a remission of any claim the Government may possess by reason of mineral deposits upon the land.

84 There can be no doubt but what this view attaches an element of uncertainty to the land granted, as well as the holdings carved out of it.

Mr. Justice Brewer, in his dessenting opinion, says: "Take any particular mile of the road on either side of the line as located, there are twenty alternate sections within the place limits. By the rule now laid down (speaking of the majority opinion of the court) the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location and exploration develops the fact of minerals, and then it is declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter — *find* or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a[illegible] single tract."

It is claimed by c[illegible]sel for appellants that the supreme court of the Territory, in the [illegible] of Tarpey *vs.* The Deser-t Salt Company, 5 Utah, 495, decided th[illegible] all lands, whether surveyed and selected or not, within the grant limits, passed to the grantee, and clothed it with a perfect legal title.

An examination of that case does not fully sustain counsel's statement. The court regarded the grant as conferring a perfect legal title *in præsenti*, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the Government; but this declaration is somewhat modified by the expression, which is the important announcement in the opinion. It is this: "We think it is now beyond controversy that where the question is pre-

85 sented, as it is here, where no right of the Government reserved in the act making the grant is involved, it grants the legal title *in præsenti* to all the lands included in the grant, whether surveyed or selected or not."

A right of the Government is involved in the reservation found in the act of July 1, 1862. The minerals were reserved to the sovereign. We agree with this view, that, aside from the reservation in the grant, a legal title passed to the grantee for all the lands covered by the grant.

If the Union Pacific obtained a title less than fee-simple by this grant, and we think it did, the exact character of it is not now in question. We will observe, however, that under the authority of the Deseret Salt Company *vs.* Tarpey, *supra*, the delay in issuing patent or omission of the Government to explore and decide as to the mineral character of the lands would not prevent the grantee from occupying and holding the lands and maintaining possessory actions against trespassers.

A fee-simple estate is the largest in land known to the law. It is an absolute estate in perpetuity and excludes any qualifications, restrictions, or limitations.

From the foregoing it is apparent that if the lands in controversy in this case are devoid of minerals, then the grantee possesses a perfect legal title; if it contains minerals aside from coal and iron, the railroad company has no title whatever; yet, as above stated, the Barden case leads to the position that if there be undiscovered mineral when patent issues, the presumption becomes conclusive that it is barren of mineral wealth. The failure to discover minerals and the conclusiveness of this presumption confers an indefeasible title, though in fact deposits of mineral wealth may abound in greater quantities than in the famous El Dorado.

86 The railroad's title, then, to this land is subject to be defeated. At most its title is a base or determinable fee. It may be continuous forever or it may be determined at any moment, prior to the issuance of patent, upon the discovery of mineral.

And the case of Ankeny *vs.* Clark, 146 U. S., 345, supports the view announced in the case of Barden, viz., that until patent issues the title is imperfect in the grantee.

2. Respondents contend that, even if the title of the railroad company were free from imperfections, the various conveyances executed by it and its trustees and grantees did not pass a fee-simple title to plaintiffs. We think the evidence clearly establishes the truth of this contention. It is not necessary to examine all the defects in the chain of title between the railroad company and the defendants, but we will content ourselves with a single reference. In the deed from the railroad company to plaintiffs the following reservation appears: "Reserving, however, to the said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands, and to mine and remove the same if found, and for this purpose it shall have the right of way over and across said lands and space necessary for the conduct of said business thereon, without charge or liability for damage therefor."

This is an incumbrance, an easement, upon the land. The grantees did not protect it from invasions and trespasses as oft repeated as the grantor desired.

While the fee passed to the grantee, assuming that it was held by the grantor, it was a servient estate. The mere statement of the reservation suffices to show the incompleteness of the estate conveyed to plaintiffs.

87 But counsel insist that the deed executed by the railroad company on the second of November, 1891, cured this defect. The findings show that after the defendants had claimed a re-cis-ion of the contract because no fee-simple title passed to them, the railroad company executed a quitclaim deed to plaintiffs, wherein it released "all right, claim, * * * it may have in or to any coal which may thereafter be found upon or beneath the surface of said land, * * * it being the intention of this deed to relinquish any rights which the said Union Pacific Railway Company may have retained in said land by virtue of the coal reservation * * * included in said deed of October 18, 1889."

It will be observed that the company not only reserved the right

to enter upon the lands and prospect and mine for coal, but "other minerals within and underlying said lands." The quitclaim deed only relinquished the right to prospect and mine for coal. It is clear that even if the release had been in time—that is, prior to defendants' notice of rescis-ion—it is insufficient. It releases less than was reserved.

3. The finding of the referee upon this question was that the plaintiffs informed defendants that they owned and had a good title in fee-simple to 440 acres of land lying west of Ogden City, which said land so referred to was the land intended to be conveyed to defendants, and that the defendants had not seen said land and were not acquainted with the title, but that plaintiffs promised that they would furnish defendants with an abstract of title to said land; that defendants believed, relied, and acted upon the representations of plaintiffs, and, without investigating the title, purchased an undivided two-thirds interest therein which purchase defendants
88 would not have made if they had not believed said representations; that said representations were untrue. The conclusion of law based upon this finding is that the representations made to defendants concerning the title were untrue and a fraud in law upon the defendants.

Appellants contend that this finding and conclusion show that there was no "moral" fraud; that there was simply innocent misrepresentation as to title, and that where there is a partial failure of title or a defect therein, coupled with innocent misrepresentation as to such title, a court of equity will not rescind where the contract has been executed.

The learned counsel for plaintiffs insist that the findings and conclusions of law show that the plaintiffs are entirely exonerated from moral turpitude or anything that indicates *mala fides*. It is true there is no direct finding of a *scienter* in the misrepresentations, but it seems equally clear that plaintiffs are not wholly exculpated from wrong in the transaction. Plaintiffs knew that defendants had never seen the land, and that they were unacquainted with the title; they kn-w that the purchase was being made entirely upon their representations respecting the title and its indefeasibility. The conclusion of the referee is not equivalent to a declaration that the plaintiffs were innocent in their affirmations of the unimpeachable character of their title. But, conceding the construction placed upon the findings and conclusions of law above referred to as the correct one, the question presents itself whether under the facts there is ground for equitable relief in behalf of defendants. Counsel for appellants assume that the facts in this case show an executed contract, and learnedly argue that equity will not decree re-cis-ion of an executed contract in the absence of "moral" fraud, and that
89 where the contract is a warranty deed and it is executed by the necessary parties, the purchaser has no remedy, either in law or equity, in respect of defects in the title or quantity or quality of the estate which are not covered by the vendor's covenants.

If the facts in this case show an executory contract only, it is not necessary to the determination of this case that we decide

whether there is "legal," as distinguished from "moral," fraud, or what remedies are afforded the purchaser in executed contracts, where there is fraud or breach of covenants, because it is conceded when the contract is still executory the power of equity to decree rescission is ample.

Is the transaction between the parties to this suit an executed or executory contract? "A contract is executory when the thing agreed has not been done. It is executed when the thing has been done. * * * One who has begun to do what he promised, but has not finished, has executed his undertaking in part."

Bishop on Con., sec. 624.

Conceding that plaintiffs had a fee-simple title to the land intended to be conveyed, the deed contained a description of wholly different land. The land which defendants agreed to purchase was not conveyed. They contracted for a warranty deed to a certain tract of land. The contract was not fully performed by plaintiffs. It was executory. The writing or deed amounted only to a contract to convey the land which plaintiffs claimed to own, and in equity would be enforcible, and, if the evidence was sufficient, would warrant a decree of specific performance. It was a contract executory, conveying a chose in action, not a contract executed, conveying a chose in possession.

90 2 Blackstone Com., page 443.

McDonald *vs.* Hewitt, 15 Johns. Ch., 349.

No right *in rem* was created; the only rights existing were *in personam*. If the contract between the parties had been executed, they would no longer have been bound by a contractural tie; rights would have been acquired in property which would have extinguished the contract. But we find plaintiffs asking for reformation of the contract, showing that it was incomplete, executory; that the rights were *in personam*. They were seeking to enforce a chose in action.

"An executory contract is one in which a party binds himself to do or not to do a particular thing."

Fletcher *vs.* Peck, 6 Cranch, 137.

Plaintiffs' warranty deed was a contract, in which they bound themselves to convey the land defendants agreed to purchase, but parol evidence would be required to establish the correct description. It was a defective deed, containing land which neither of the parties understood was conveyed or agreed to convey; it was therefore only a contract to convey, and was executory. A defective deed is an executory contract, and "it is a familiar rule that a defective deed may be treated in equity as an agreement to convey and performance enforced, and where it is we think * * * * that it stands on the same footing as an executory contract to convey."

Hanson *vs.* Nichelsen, 19 Wis., 535.

Petesch *vs.* Hambach *et al.*, 48 Wis., 447.

Eaton *vs.* Eaton, 15 Wis., 284.

Mastin *vs.* Halley, 61 Mo., 200.

Fitch *vs.* Gosser, 54 Mo., 274.

91 In the case of Hunt *vs.* Admrs. of Rousmaniere, 1 Peters, 13, the court say: "There are certain principles of equity applicable to this question which as general principles we hold to be incontrovertible. The first is, that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, in writing or by parol, previously entered into, but which by mistake of the draughtsman, either as to equity or law, does not fulfill or violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into is one of the peculiar branches of equity jurisdiction, and if the instrument which intended to execute the agreement be for any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement."

And in the case of Walden *vs.* Skinner, 101 U. S., 585, this language is adopted and the principle reaffirmed.

In the case of Conrad *vs.* Schwamb, 10 N. W. Rep., 396, plaintiffs brought an action to recover a tract of land. A deed had been executed to defendant, the grantors intending to convey certain land in fee, but by mistake it was described as being in a different quarter section. The court say: "The deed * * * although it did not convey the land intended, must be treated in equity as an executory contract * * * to convey such land. * * * Hence * * * Schwamb might have maintained an action against Felton * * * to compel Felton specifically to perform his executory contract to convey the land claimed, so far as he could perform it."

92 And the quitclaim deed correctly describing the land tendered to defendants after the discovery of the mistake in the first deed did not answer the contract and fully execute it. Besides, the defendants had, a few days prior thereto, elected to rescind the contract, and had demanded back the amount paid and the surrender of the notes held by plaintiffs.

From the foregoing authorities we are of the opinion that the facts in this case do not constitute an executed contract; the transaction between the parties, we think, evidences an executory contract, and that equity has power to decree a rescission.

We are not determining what *mala praxis* is sufficient to entitle one to rescind an executed contract, for, as stated, the transaction in this case shows an executory contract, and we believe the rule to be well settled that material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertance, when relied on and become the foundation of the active relations between the parties, operate as a "surprise and imposition" and constitute such fraud as will move a court of equity to decree a rescission of an executory contract."

1 Story Eq., sec. 193.
1 Beach Eq. Juris., secs. 69, 93.
Bishop on Con., sec. 662.
Clark on Con., p. 339.

2 Pom. Eq. Juris., secs. 883, 887, 888.
Dorry *vs.* Peck, L. R., 14 App. Cas., 337.
Arkwright *vs.* Newbold, L. R., 17 Ch. Div., 320.
Traell *vs.* Baring, 4 D. C., J. & S., 318.
Ship *vs.* Criskill, L. R., 10 Eq., 73.
Cooley on Torts (2 ed.), p. 582.
Hexter *vs.* Bast, 125 Pa. St., 52.
Chatham Furnace Co. *vs.* Moffatt, 147 Mass., 483.
Wells *vs.* McGrooch, 71 Wis., 196.
Defrees *vs.* Carr, 33 Pac. Rep., 217.
Cotzhausen *vs.* Simon, 47 Wis., 106.
Grant *vs.* Law, 29 Wis., 99.
Knowlton *vs.* Amy, 47 Mich., 204.
Bullitt *vs.* Farrarr, 6 L. R. Ann., 149.
Litchfield *vs.* Hutchinson, 117 Mass., 195.
Smith *vs.* Richards, 13 Pet., 26.
2 War. on Vend., sec. 18.

93 "As a rule, all representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for a rescission, even though they may have been made without fraudulent intent."

3 War. on Vend., sec. 18.
Allen *vs.* Hart, 72 Ill., 104.
Bennett *vs.* Judson, 21 N. Y., 238.
Mulvey *vs.* King, 39 Ohio St., 491.
Wilcox *vs.* Wes. Uni., 32 Ia., 369.
Alvarez *vs.* Brannan, 7 Cal., 503.

The facts in this case show that the representations of plaintiffs as to the character of their title to the land were more than mere expressions of opinion. They were affirmations of a material fact and inducements to the contract. Being untrue and material, they are fraudulent.

Cressler *vs.* Rees, 27 Neb., 515.
Conlan *vs.* Roemer, 52 N. J. L., 53.

4. There is no controversy in regard to the materiality of the representations made respecting the title, nor is it contended that defendants did not act in due season in giving notice of the rescission after the discovery of the defect in the title; but plaintiffs urge that, the defendants not having tendered back a deed of the property conveyed, there was no rescission. The rule is, no doubt, that the parties must be placed in *statu quo* before a rescission can be effectuated. Having decided that the warranty deed executed by plaintiffs was merely an executory contract, it follows that defendants had nothing to return to plaintiffs in order to place them in *statu quo*. The referee found that the land described in the warranty deed was not owned by plaintiffs, and the conveyance executed by
94 them certainly created no cloud upon the owner's title, if there was an owner. Plaintiffs conveyed nothing to defend-

ants; their deed was worthless, except that it might be the basis of an action in equity for specific performance, or the foundation of a suit at law, after reformation, for a breach of the vendor's covenants. Plaintiffs having parted with nothing of value, defendants had nothing to return; and in such cases the failure to tender that which was valueless cannot be interposed to prevent a rescission of the contract.

Bishop on Con., sec. 679.

The referee finds that the defendants never actually occupied any of the land sought to be conveyed, but that plaintiffs were in possession of the same.

We think that the record clearly discloses that the defendants did all that was required by law upon their part in order to justify a decree of rescission by the court.

We find no error in the record and therefore affirm the judgment of the lower court with costs.

We concur.

MERRITT, *C. J.*

I concur in the result.

BARTCH, *J.*

Marked: Filed June 3, 1895.

95 UNITED STATES OF AMERICA, *88:*

To Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within 60 days from the date of this citation, pursuant to an appeal allowed in the supreme court of the Territory of Utah, wherein Louis B. Adams and Watson N. Shilling were appellants and you, the said Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed, were respondents, to show cause, if any there be, why the judgment rendered in said supreme court on the 3rd day of June, A. D. 1895, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Samuel A. Merritt, chief justice of the Territory of Utah, this the 8th day of July, A. D. 1895.

[Seal Supreme Court, Territory of Utah, United States of America.]

SAMUEL A. MERRITT,
Chief Justice of Utah.

Attest:

JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

Service of a copy of the above citation is hereby admitted this 10th day of July, A. D. 1895.

RICHARDS & MACMILLAN &
H. H. HENDERSON,
Attorneys for Appellees.

[Endorsed:] Filed in the supreme court Jul· 11, 1895, at Salt Lake City, Utah. Joseph P. Bache, clerk.

96 In the Supreme Court of the United States.

LOUIS B. ADAMS and WATSON N. SHILLING, Appellants,
vs.
HIRAM H. HENDERSON, GEO. H. BURGITT, Administrator of the Estate of Edward A. Reed, Deceased, and Millie G. Reed, Appellees.

Assignment of Errors.

Come now the appellants above named and allege that the supreme court of Utah Territory erred in this action in affirming the judgment of the fourth district court of said Territory for the following reasons:

I. Because the evidence is insufficient to justify that part of the third finding of fact in the words and figures following, to wit: "That the representations made by Adams and Shilling, as aforesaid, to said Reed and Henderson were untrue," in this: that the evidence did not and does not show that Adams and Shilling did not have a good and indefeasable estate in fee-simple to the land described in finding of fact No. II.

II. Because the evidence is insufficient to justify the second
97 finding of fact, in this: that the evidence did not and does not show that the defendants Reed and Henderson or either of them rescinded the contract of sale between themselves and plaintiffs.

III. Because the conclusion of law No. II is against law and contrary to findings of fact, in this: that the evidence does not show that the plaintiffs did not or do not now have a good title in fee-simple to the lands described in conclusions of law No. I, or that the notes mentioned in said conclusion No. II are without consideration.

IV. Because the third conclusion of law is against law, in this: that the findings of fact do not show that the representations by plaintiffs to Reed and Henderson concerning the title to the land intended to be conveyed by them were untrue.

V. Because the fourth conclusion of law is against law, in this: that the findings of fact do not show that the title of the Union Pacific Railway Company to the lands described in finding of fact No. II was not good, or that it was encumbered, or that it may be defeated at any time by the United States.

VI. Because the fifth conclusion is against law, in this: that the findings of fact do not show that Hiram H. Henderson and George H. Burgitt, guardian of E. A. Reed, or either of them, are entitled

to recover of plaintiffs the promissory notes or money mentioned in said conclusion of law.

VII. Because the last two conclusions of law are against law,
98 in this: that the findings of fact do not show and the evidence does not show that the quitclaim deed of November, 1891, did not release the right of the Union Pacific Railway Company to enter upon the land *and* intended to be conveyed to explore for minerals other than coal, and the findings of fact or the evidence did not show that the United States retained the right to explore or authorize the exploration of the lands intended to be conveyed for minerals other than coal.

VIII. The court erred in its second conclusion of law, in this: that neither the findings of fact nor the evidence shows that the plaintiffs did not, do not now, and never did have a good title in fee-simple to the lands described in conclusion of law No. I, or that the several notes given by the defendants to the plaintiffs mentioned in conclusion of law No. II or that either of them were given without consideration.

IX. The court erred in making the third conclusion of law, in this: that neither the findings of fact nor the evidence show that the representations made by the plaintiffs concerning the title to lands described in conclusion of law No. I were untrue or a fraud in law upon the defendants or either of them.

X. The court erred in its fourth conclusion of law, in this: that neither the findings of fact nor the evidence showed or show that the title of the Union Pacific Railway Company to the land in controversy (being the land described in conclusion of law No. I) is not or was not a good title, or that it was encumbered, or that it could or might he defeated at any time by the United States before the issuance of patent.

99 XI. The court erred in its fifth conclusion of law, in this: that neither the findings of fact nor the evidence shows that the defendants Hiram H. Henderson and George H. Burgitt, as guardian of the estate of Edward A. Reed, or either of them, are entitled to recover from the plaintiffs in this action the promissory notes or money mentioned in conclusion of law No. V.

XII. The court erred in the last two conclusions of law, in this: that the quitclaim deed mentioned in the next to last conclusion of law does not show that the Union Pacific Railway Company did not release its right to enter upon the land in said conclusion of law described and explore the same for minerals other than coal.

XIII. Because neither the findings of fact nor the evidence shows that the United States held or retained the right to explore or authorize the exploration of said land for minerals other than coal.

KIMBALL & KIMBALL,
BENNETT, MARSHALL & BRADLEY,
P. L. WILLIAMS,
Attorneys for Appellants.

[Endorsed:] Louis B. Adams *et al.*, appellants, *vs.* Edward A. Reed *et al.* Assignment of errors. Filed in the supreme court Jul-11, 1895, at Salt Lake City, Utah. Joseph P. Bache, clerk.

100 In the Supreme Court of the United States.

LOUIS B. ADAMS and WATSON N. SHILLING, Appellants,
vs.
HIRAM H. HENDERSON, GEORGE H. BURGITT, Administrator of the Estate of Edward A. Reed, Deceased, and Millie G. Reed, Appellees.

Know all men by these presents that we, Louis B. Adams, Watson N. Shilling, Lars M. Nelson, and Louisa M. Adams, of Ogden, Utah, are held and firmly bound unto Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed in the sum of three hundred dollars, to be paid to the said Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased. and Millie G. Reed, their and each of their executors, administrators, or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 6th day of July, 1895.

Whereas the above-named Louis B. Adams and Watson N. Shilling have taken an appeal to the Supreme Court of the United States to reverse the judgment of the supreme court of the Territory of Utah in a certain action wherein the said Louis B. Adams and Watson N. Shilling were appellants and said Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed,
101 deceased, and Millie G. Reed were respondents:

Now, therefore, the condition of this obligation is such that if the above-named Louis B. Adams and Watson N. Shilling shall prosecute their said appeal to effect and answer all costs if they shall fail to make good — plea, then this obligation to be void; otherwise to remain in full force and virtue.

LOUIS B. ADAMS. [SEAL.]
WATSON N. SHILLING,
By L. B. ADAMS. [SEAL.]
LARS M. NELSON. [SEAL.]
LOUISA M. ADAMS. [SEAL.]

Signed, sealed, and delivered in the presence of—
G. P. McCABE.
G. N. KIMBALL.

TERRITORY OF UTAH, } ss:
County of Weber, }

Lars M. Nelson and Louisa M. Adams, the sureties who are named in and who executed the foregoing bond, being severally sworn, each for himself deposes and says:

That he is a freeholder in said county of Weber and worth the amount specified in said bond as the penalty thereof over and above all his debts and liabilities, exclusive of property exempt from execution.

LARS M. NELSON.
LOUISA M. ADAMS.

Subscribed and sworn to before me this 6th day of July, 1895.

GORDON N. KIMBALL,
Notary Public.

[SEAL.]

Marked: Filed in the supreme court July 8th, 1895, at Salt Lake City, Utah. Joseph P. Bache, clerk. Approved July 8th, 1895. Merritt, chief justice.

102 UNITED STATES OF AMERICA, } *ss:*
Territory of Utah, }

I, Joseph P. Bache, clerk of the supreme court in and for the Territory of Utah, in pursuance of an appeal allowed in the case of Louis B. Adams *et al.*, as appellants, and Edward A. Reed *et al.*, as respondents, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, bond and assignment of errors, and original citation, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, and bond is a full, true, and complete copy of the several originals thereof on file and of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this 5th day of August, A. D. 1895.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 16,057. Utah Territory supreme court. Term No., 360. Louis B. Adams and Watson N. Shilling, appellants, *vs.* Hiram H. Henderson, George H. Burgitt, administrator of the estate of Edward A. Reed, deceased, and Millie G. Reed. Filed October 9th, 1895.